Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether reliance on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to an agency decision on the basis of a fictitious statutory ambiguity manufactured by the agency to accommodate its own policy preferences is consistent with Article I's vesting of "all legislative powers" in Congress and with the separation of powers principles underlying the nondelegation doctrine.

PARTIES TO THE PROCEEDING

Ameritech Corporation
AT&T Corporation
BellSouth Corporation and BellSouth Telecommunications, Inc.
Competitive Telecommunications Association
Federal Communications Commission
Frontier Corporation
ICG Communications, Inc.
MCI Telecommunications Corporation
Nextlink Ohio, Inc.
Nextlink Illinois, Inc.
Qwest Communications Corporation
Time Warner Communications
United States of America
U S WEST Communications, Inc.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court as follows:

Petitioner U S WEST Communications, Inc., a local exchange carrier that provides telecommunications products and services to the general public, is a wholly owned subsidiary of U S WEST, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. There is no publicly held company that owns 10% or more of the stock of U S WEST, Inc.

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AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S. Ct. 721 (1999) 24
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Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995) 16
American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *modified in part*, No. 97-1440 *et al.*, 1999 WL 979463 (D.C. Cir. Oct. 29, 1999) 3, 26, 27
Archer-Daniels-Midland Co. v. United States, 37 F.3d 321 (7th Cir. 1994) 16
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 16
Bell Atlantic Telephone Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997) 13
BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998) 13
Beverly Enterprises v. NLRB, 165 F.3d 960 (D.C. Cir. 1999) 16
Beverly Enterprise v. NLRB, 165 F.3d 290 (4th Cir. 1999) (en banc) 17
Bowsher v. Synar, 478 U.S. 714 (1986) 25
California v. FCC, 124 F.3d 934 (8th Cir. 1997), *rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) 13
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 25
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*
City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999) 13
Clinton v. City of New York, 524 U.S. 417 (1998) 25
Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997) 13
Federal-Mogul Corp. v. United States, 63 F.3d 1572 (Fed. Cir. 1995) 16
INS v. Chadha, 462 U.S. 919 (1983) 25

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Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980)	26
Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S. Ct. 721 (1999)	13
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Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	5
Melcher v. FCC, 134 F.3d 1143 (D.C. Cir. 1998)	13
Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991)	25
Mississippi Poultry Ass'n v. Madigan, 31 F.3d 293 (5th Cir.) (1994) (en banc)	17
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Morales v. Trans World Airlines, 504 U.S. 374 (1992)	19
Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983)	4
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	24
National Cable Television Ass'n v. United States, 415 U.S. 336 (1974)	29
National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479, 118 S. Ct. 927 (1998)	17
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)	25
Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991)	16
Russello v. United States, 464 U.S. 16 (1983)	20

TABLE OF AUTHORITIES—Continued

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SBC Communications Inc. v. FCC, 138 F.3d 410 (D.C. Cir. 1998)	13
Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523 (8th Cir. 1998)	13
Southwestern Bell Telephone Co. v. FCC, 153 F.3d 597 (8th Cir. 1998), *vacated sub nom. Ameritech Corp. v. FCC*, 119 S. Ct. 2016 (1999)	13
Sullivan v. Everhart, 494 U.S. 83 (1990)	16
Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999)	13
U S WEST Communications, Inc. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999)	1
U S WEST, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999)	13
United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983)	6, 7
United States v. Western Electric Co., 627 F. Supp. 1090 (D.D.C.), *appeal dismissed in relevant part*, 797 F.2d 1082 (D.C. Cir. 1986)	6
U S WEST Communications, Inc. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999)	13
Yang v. Maugans, 68 F.3d 1540 (3d Cir. 1995)	16

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47 U.S.C. § 271(d) ..... *passim*
47 U.S.C. § 271(e) 19
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47 U.S.C. § 273(a) 19
47 U.S.C. § 274(a) 19
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47 U.S.C. § 275(a) 19
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AT&T Corp. v. BellSouth Corp., 14 FCC Rcd 8515 (CCB 1999) 24
Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC2d 261 (1976) 19
Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 12 FCC Rcd 2824 (1997) .. 8, 20

ARTICLES AND TREATISES

Aman, Alfred C., Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 Cornell L. Rev. 1101 (1988) 15
Byrne, Thomas J., *The Continuing Confusion over Chevron: Can the Nondelegation Doctrine Provide a Partial Solution?*, 30 Suffolk U. L. Rev. 715 (1997) 15
1 Davis, Kenneth C. & Pierce, Richard J., *Administrative Law Treatise* § 3.4 (3d ed. 1994) 18

TABLE OF AUTHORITIES—Continued

Page

Dorf, Michael C. & Sabel, Charles F., *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998) 15

Fallon, Richard H., Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916 (1988) 15

Farina, Cynthia R., *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989) 15

Gellhorn, Ernest & Verkuil, Paul, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989 (1999) 16

Greene, Abner S., *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994) 15

Mashaw, Jerry, *et al.*, *Administrative Law: The American Public Law System* (3d ed. 1992) 13

Mikva, Abner J., *How Should the Courts Treat Administrative Agencies?*, 36 Am. U. L. Rev. 1 (1986) 15

Scalia, Antonin, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511.. 13

Schwartz, Bernard, *Administrative Law* § 10.31 (3d ed. 1991) 14

Seidenfeld, Mark, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 Admin. L. Rev. 429 (1999) 17

Shapiro, Sidney A. & Glicksman, Robert L., *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L.J. 819 15

Silberman, Laurence H., *Chevron—The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821 (1989) 18

Sunstein, Cass R., *Constitutionalism after the New Deal*, 101 Harv. L. Rev. 421 (1987) 15

1 Tribe, Laurence H., *American Constitutional Law* § 5-19 (3d ed. 2000) 14, 16

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

U S WEST Communications, Inc. ("U S WEST") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a) is reported at 177 F.3d 1057 (D.C. Cir. 1999). The *Order* of the Federal Communications Commission (App. 10a) at issue here is reported as *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 21,438 (1988) ("*Order*").

JURISDICTION

The decision of the court of appeals was issued on June 8, 1999. The court of appeals denied U S WEST's petition for rehearing and suggestion for rehearing en banc (App. 96a-98a) on August 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision at issue here, 47 U.S.C. § 271, is reproduced at App. 99a.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to call a halt to a practice whereby the courts of appeals, none more starkly than the D.C. Circuit in the decision below, have manipulated the doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), so as to transform fundamentally unambiguous congressional statutes into wholesale transfers of law-making power to administrative agencies, in plain violation of the nondelegation doctrine enunciated by this Court six decades ago and never since repudiated. The Federal Communications Commission ("FCC" or "Commission") manufactured an ambiguity in section 271(a) of the Telecommunications Act of 1996 ("1996 Act" or "Act"), which forbids certain named telephone companies to "provide" long distance services in some circumstances. Ignoring the normal meaning of the word "provide," the overall structure of the 1996 Act, and its own prior interpretations of the Act, the FCC read section 271(a) to bar those companies (including U S WEST) from any "involvement" in the long distance market that would enable them to obtain "competitive advantages" in any other market. App. 54a. The agency ruled that the word "provide" must be ambiguous enough

to support its interpretation because of a supposed policy preference—albeit one never actually articulated by Congress—for excluding all such "involvement." App. 47a-48a, 53a-56a. The D.C. Circuit was "puzzled" by the FCC's statutory interpretation, and acknowledged that the agency's construction could be "nonsensical" in certain circumstances, but felt bound by *Chevron* to acquiesce in the Commission's decision. App. 4a, 7a.

The FCC's *Order*, and the D.C. Circuit decision upholding it, skip over the most basic principle of *Chevron* —that an agency's freedom to interpret a statute is controlled by that statute's language and structure—and leave firms in this regulated industry exposed to damages for relying on the words Congress actually used. These decisions are also in square conflict with the nondelegation doctrine. *See American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *modified in part*, No. 97-1440 *et al.*, 1999 WL 979463 (D.C. Cir. Oct. 29, 1999) (overturning a similarly self-aggrandizing regulatory ploy by EPA). Even if it were legitimate to manufacture an ambiguity in order to obtain *Chevron* deference for an agency's own policy preference—and it plainly is not—the FCC identified no intelligible principle (in the statute or otherwise) to guide the application of its policy preference in this case. Instead, the agency apparently felt free to make new law as it saw fit, using the statute as nothing more than a thematic guide. But the nondelegation doctrine is premised on the fundamental separation of powers understanding that "the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). "Legislative power is nondelegable. Congress can no more 'delegate' some of its Article I power to the Executive than it could 'delegate' some to one of its committees. What Congress does is to *assign responsibilities* to the Executive . . . ." *Id.* at 777

(Scalia, J., concurring in part and concurring in the judgment).

The *Chevron* framework, as misapplied by the D.C. Circuit in this case and all too frequently by other circuits, conflicts with sound statutory construction and has created growing tension with the separation of powers principles expressed in the nondelegation doctrine. Increasingly, administrative agencies are "finding" nonexistent ambiguities in ordinary language in order to arrogate to themselves the power to make law. Under *Chevron*, statutory interpretation has become an exercise in ascertaining only a *range* of permissible constructions within which an agency may promote any policy it likes. The agency chooses the construction that best fits its goals, making a "law" that did not exist *until* the agency so chose. The lower courts then invoke *Chevron* to bless the "law" made by the agency. The new "law" is not even permanent: Successive Administrations may discard the interpretation and choose another for no better reason than that the political winds have changed direction.[1]

Such deference to manufactured ambiguity grants agencies lawmaking power that is starkly inconsistent with the assumptions of the nondelegation doctrine. The unfettered freedom to define any rational statutory "meaning" as "the law of the land" is the very essence of the legislative authority granted to Congress by Article I. By comparison, judges "make [law] . . . as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment). Just as Congress cannot bind its successors in the exercise

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[1] This flexibility is subject only to the Administrative Procedure Act's minimal requirement that the agency explain its about-face. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

of its lawmaking authority, administrative agencies have employed *Chevron* to construe statutes in a manner that their successors are free to alter in the future. Hence, the difference between agency lawmaking and judicial interpretation is illustrated by this Court's holdings that a pre-*Chevron* judicial interpretation of a statute is binding on the agency, whereas an earlier agency selection of a statutory meaning is not binding on successor agencies. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

The most important question of statutory interpretation is no longer "What does the statute say?" or "What does the statute mean?" but rather "Can the statute be made to seem ambiguous?" If the answer is "yes"—and it almost always is—the *Chevron* framework delegates to administrative agencies the fundamental power not merely to say what the law is but also to make law out of whole cloth. In this case, for example, it is simply wrong to say, under any principled interpretation of the language used by Congress, that the term "provid[ing]" has the same meaning as the word "involvement." The Commission did not simply construe the verb "provide" in this case. Rather, it rewrote the statute to reflect the much more expansive law the agency would have adopted had it held the drafting pen—a law that would have reflected the FCC's preferred policy of maximizing U S WEST's incentives to seek approval under section 271(d) of the Act for the actual provision of long distance services. *See* 47 U.S.C. § 271(d). The agency then justified its decision by referring back to its own manufactured ambiguity. *Chevron* was never intended to effect such a fundamental shift in the locus of legislative authority. Review is plainly warranted in order to re-establish the proper balance between congressional and administrative power.

A. Regulatory Background

1. *The AT&T Consent Decree*

In 1982, AT&T and the United States settled the now-famous antitrust action in which AT&T had been charged with using its local telephone network to monopolize the long distance and equipment manufacturing markets. The resulting "AT&T Consent Decree" addressed that problem by divesting AT&T of its local telephone exchange operations, then conducted through a number of distinct Bell Operating Companies ("BOCs"). *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). U S WEST comprises three of the original BOCs, and therefore was subject to the AT&T Consent Decree.

The Consent Decree prohibited the divested BOCs from engaging in a variety of businesses dominated by AT&T. *See id.* at 227-28. Foremost among these "line-of-business" restrictions was a ban on the provision of "interexchange telecommunications services." The Decree specifically defined "telecommunications" services as "the transmission, between or among points specified by the user, of information of the user's choosing, . . . including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission." *Id.* at 229. The decree court subsequently interpreted this language broadly to cover "the business of providing interexchange services." *United States v. Western Elec. Co.*, 627 F. Supp. 1090, 1100 (D.D.C.), *appeal dismissed in relevant part*, 797 F.2d 1082 (D.C. Cir. 1986).

2. *The Telecommunications Act of 1996*

The Telecommunications Act of 1996 ("the 1996 Act" or "the Act") ushered in a new era of telecommunications competition. The Act eliminated the state fran-

chises that had shaped the local telecommunications industry, and it facilitated the entry of new competitors into local markets by ensuring them access to the services and facilities of incumbent telephone companies (including the BOCs). *See* 47 U.S.C. §§ 251, 252. It also abrogated the AT&T Consent Decree and left the BOCs subject only to the applicable provisions of the 1996 Act.[2] Thus, the Act set the stage for cross-sector competition among historically distinct groups of providers: Long distance carriers were encouraged to enter local markets, and local telephone companies, including the BOCs, were expected to enter the long distance market.

Although the 1996 Act terminated the Consent Decree, Congress adopted a similar interexchange services ban in 47 U.S.C. § 271. Section 271 prohibits the BOCs from "provid[ing]" certain long distance services until they have obtained approval from the FCC.[3] But the Act defines the forbidden services—in-region "interLATA services"[4] —more narrowly than did the Consent Decree. As noted above, the broad definition in the Decree barred the BOCs from providing "all instrumentalities, facilities, apparatus, and services . . . essential" to the interLATA (or interexchange) "transmission of information." *See* 552 F. Supp. at 229. By contrast, the 1996 Act defines the prohibited "interLATA services" to be only the "transmission . . . of information" between LATAs—dropping

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[2] *See* 47 U.S.C. § 152 note (West 1998).

[3] Section 271 also enumerates the steps that a BOC must take to win such approval, including the requirement that the FCC must find that the BOC has satisfied a "competitive checklist." *See* 47 U.S.C. §§ 271(c), (d).

[4] "InterLATA services" is the statutory counterpart to "interexchange services," the term used in the Consent Decree. Both "interLATA services" and "interexchange services" denote long distance traffic that is carried between "Local Access and Transport Areas" ("LATAs").

the language that had expanded the Consent Decree to reach ancillary services. *See* 47 U.S.C. §§ 153(21), 153(43). Congress also departed from the Decree by authorizing the BOCs to provide at least ten "interLATA services" that previously had been forbidden. *See id.* §§ 271(b)(2), (b)(4), (g).

B. The Buyer's Advantage Program

While the 1996 Act prohibits the BOCs from *providing* certain long distance services, it contains no provision barring them from *marketing* the long distance services of an unaffiliated entity or from otherwise being tangentially "involved" with such services. Indeed, as both the FCC and the D.C. Circuit acknowledged, section 272(g)(2) implicitly authorizes BOCs to engage in some kinds of marketing on behalf of unaffiliated providers.[5] *See* App. 3a-5a, 49a-51a. And the Commission's *Alarm Monitoring Order* had determined that the almost-identical statutory ban on the *provision* of alarm monitoring services by BOCs did not bar BOCs from *marketing* the alarm monitoring services of unaffiliated providers.[6] Accordingly, following passage of the Act, U S WEST began to explore joint marketing arrangements with unaffiliated long distance carriers. U S WEST eventually reached a teaming agreement with Qwest Communications Corporation ("Qwest"), at the time a small, unaffiliated long distance carrier.[7]

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5 47 U.S.C. § 272(g)(2) limits a BOC's freedom to market the long distance services of its affiliates, but imposes no restrictions on BOC marketing of the services of unaffiliated entities.

6 *See Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 FCC Rcd 2824, at ¶¶ 38-40 (1997) (*"Alarm Monitoring Order"*) (interpreting 47 U.S.C. § 275).

7 *See U S WEST Communications, Inc. v. FCC*, No. 98-1468, *Joint Appendix* 67, 93, 97-98 (D.C. Cir. Mar. 18, 1999) ("JA"). On July 19, 1999, Qwest and U S WEST announced that they plan to merge their operations. The proposed merger has no bearing on this case, in which a claim for damages is still pending based on the joint

Under that agreement, U S WEST jointly marketed its local services and Qwest's long distance services as part of a new customer convenience initiative called the "Buyer's Advantage" program. This marketing program gave U S WEST's local customers the opportunity to order any combination of telecommunications services off a menu of service options available from U S WEST or Qwest.[8] For example, a customer could order, in a single phone call, U S WEST's local services and *Qwest's* long distance service—at Qwest's best rate.[9] The Buyer's Advantage program neither obligated a customer to order *any* service provided by either company nor rewarded a customer with a discount for ordering any particular service or combination of services.[10] In fact, all of the service options listed on the Buyer's Advantage menu could be ordered directly from U S WEST or Qwest, as applicable, at the same price.[11] The program simply offered U S WEST's local customers a convenient one-stop shopping list of all the various services available from the two companies.

If a customer ordered Qwest's long distance service through the Buyer's Advantage program, Qwest paid U S WEST a one-time marketing fee for that customer; U S

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marketing agreement between U S WEST and Qwest as unaffiliated entities. *See* p. 10 and n.16 *infra.*

[8] *See* JA 94-95, 270-71, 317-18.

[9] *See* JA 308-09. Of course, the ability to order local and long distance service in a single phone call was not unique to the Buyer's Advantage program. Equal access obligations require U S WEST to allow customers signing up for new local service to select *any* long distance carrier during that phone call; thus, customers typically order local and long distance service at the same time. However, long distance companies typically give those customers their *worst* rate plan; customers must call the carrier directly to obtain a better rate. By contrast, the teaming agreement obligated Qwest to give its *best* rate to participating customers.

[10] *See* JA 317-18.

[11] *See* JA 94-95.

WEST was Qwest's marketing agent.[12] Qwest then processed the customer's order, entered into the contractual relationship with the customer to provide long distance services, and transmitted the customer's long distance calls.[13] Qwest responded to customer inquiries about its long distance services, and bore full responsibility for maintaining and restoring those services in the event of technical problems.[14] Qwest provided long distance service under its own brand name, was identified as the long distance provider on all customer bills, and received all the long distance revenues from customers who had ordered its services through the Buyer's Advantage program.[15] In no circumstances did U S WEST transmit or resell the transmission of long distance service under this program, or share in any revenue therefrom.

C. Proceedings Below

The teaming agreement between U S WEST and Qwest caught the immediate attention of the long distance giants. In May 1998, AT&T, MCI, and other long distance competitors of Qwest filed a federal court action challenging the Buyer's Advantage program under sections 271 and 251(g) of the 1996 Act and seeking damages and injunctive relief against U S WEST. After the district court referred the statutory issues to the Commission for resolution,[16] AT&T, MCI, and other carriers—at the Commission's invitation—filed formal administrative complaints against U S WEST. In the *Order* at issue here, the Com-

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12 *See* JA 76, 312-14.

13 *See* JA 69, 105, 302.

14 *See* JA 69, 105, 302.

15 *See* JA 67-69, 76-85, 104-05.

16 *See AT&T Corp. v. U S WEST Communications, Inc.*, Order Granting Preliminary Injunction, Referring Legality Issue to FCC, and Staying Proceedings, No. C98-634WD (W.D. Wash. June 4, 1998). This action against U S WEST is still pending.

mission concluded that the Buyer's Advantage program violated section 271 of the 1996 Act.

The *Order* found that the prohibition on "provid[ing] interLATA service" had no plain meaning because Congress had not defined the word "provide." The Commission therefore found the term ambiguous "in the context of *our interpretation*," App. 45a (emphasis added), and proceeded to adopt its own expansive interpretation of section 271. Although acknowledging that section 271 "neither prohibits nor permits *all* forms of marketing relationships" between BOCs and unaffiliated long distance carriers, App. 53a (emphasis in original), the Commission nonetheless found that section 271 "must" be sufficiently broad in scope to ban any activity that might "undermine" the BOCs' "incentives" to seek section 271 approval from the FCC. App. 47a-48a, 53a-56a. The Commission ruled that whether U S WEST's actions constituted the "provision" of in-region long distance service turned on whether its "involvement" with Qwest had "reduc[ed] its incentives to cooperate in opening its local market to competition" by enabling U S WEST to obtain "competitive advantages" in *any* market, even those (such as local and intraLATA toll services or voicemail) in which U S WEST lawfully competes. App. 54a.

The Commission found that U S WEST had used the Buyer's Advantage program to obtain "material benefits" (including, *inter alia*, a "first mover's advantage") that were "uniquely associated" with one-stop shopping for local and long distance services. *See* App. 55a-61a. The FCC determined that these benefits undermined U S WEST's incentives to take the steps the FCC deems necessarry to obtain its approval to enter the in-region long distance market, and therefore concluded that U S WEST's joint marketing had violated the statutory ban on the provision of in-region interLATA service. *See* App.

55a-61a. Despite its recognition that some forms of joint marketing must be allowed under the Act, the Commission identified only one type of joint marketing activity that it believed was permissible: the anonymous provision of back-office telemarketing. App. 68a.

On judicial review pursuant to 47 U.S.C. § 402(a), the D.C. Circuit recognized that the statutory structure compelled the conclusion that "some nontrivial range of marketing of non-affiliate services" is permissible under section 271(a). App. 4a. The court also acknowledged that it was "puzzled" by "[t]he exact meaning" of the incentives test adopted by the FCC, and observed that "too broad a notion of 'competitive advantage' or 'incentive' could make [the FCC's test] nonsensical, turning it into an excuse to stifle the BOCs at every opportunity." App. 4a, 7a, 9a. Nonetheless, relying on the purported "first mover's advantage" associated with U S WEST's ability to use the joint marketing program to offer its local customers a form of "one-stop shopping," *see* App. 7a, the court concluded that the Commission's application of its statutory interpretation to the facts of this case was reasonable enough under the deferential *Chevron* standard. The court therefore upheld the *Order*.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to restore discipline to agencies' freewheeling manipulation of the *Chevron* framework and to address the growing tension between that manipulation and the nondelegation principle. This is by no means an isolated problem. The *Chevron* incentive structure, which rewards agencies with deference for identifying "ambiguous" statutory provisions, has spurred agencies to maximize their freedom of action and minimize the possibility of adverse judicial review by unearthing such ambiguities wherever possible. Through resort to dictionary definitions that parse and reparse the various

shades of meaning of every word used by Congress, agencies usually can succeed—just as the FCC did in this case—in asserting that any statutory mandate is ambiguous to at least some degree.[17] Thus, almost every law of any complexity is now obscured by a penumbra of "reasonableness" in which the agency usurps wide-ranging power to say what the law is. Justice Scalia, among other commenters, has recognized that permitting agencies to manufacture statutory ambiguities dramatically increases their authority. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J.

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[17] The manipulation of *Chevron* is both successful and endemic. *See* Jerry Mashaw *et al.*, *Administrative Law: The American Public Law System* 734 (3d ed. 1992) ("[D]uring the first six months following *Chevron*, courts of appeals upheld agency decisions 10 percent more than in the previous six months."); *see also infra* n.22. The FCC, in fact, has made a practice of arguing that the 1996 Act is ambiguous enough to warrant *Chevron* deference, doing so in 14 of the 15 cases under the Act that have been reviewed by the courts of appeals. *See U S WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (arguing for *Chevron* deference); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (same); *U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999) (same); *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) (same); *BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998) (same); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (same); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998) (same); *vacated sub nom. Ameritech Corp. v. FCC*, 119 S. Ct. 2016 (1999); *SBC Communications Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998) (same); *Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998) (same); *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997) (arguing that statute is unambiguous); *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997) (arguing for *Chevron* deference); *California v. FCC*, 124 F.3d 934 (8th Cir. 1997) (same), *rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (same), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (same); *Competitive Telecomm. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (same).

511, 520-21 ("How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.").

This case illustrates the two adverse consequences that flow from agencies' freedom to manipulate the *Chevron* framework to their own advantage. First, particularly in enforcement contexts such as this one, private parties no longer can guide their conduct by reference to the law as enacted by Congress, but instead must adjust their behavior to reflect the possibility that an agency's "reasonable" application of a statute might stray far from the mooring provided by the statute's terms. Innovation, investment, and the implementation of new operating strategies are deterred accordingly.

Second, the bestowal of *Chevron* deference on the basis of manufactured ambiguity gives agencies such free rein that the process of statutory "construction" becomes more akin to the legislative process (albeit without Congress' political accountability) than to the interpretative role an agency should rightfully play. *Chevron* is now construed by the lower courts to permit Congress effectively to delegate to an agency—less by the conscious decision of any given Congress than by congressional inaction in the face of the *Chevron* doctrine itself—the power to make the truly basic policy decisions and interest trade-offs that Congress is supposed to make under our constitutional system. These decisions constitute neither the filling of interstitial gaps nor the identification of triggering contingencies, but the making of law. *Chevron* has come close to installing agencies, whether executive or independent, as mini-Congresses and mini-judiciaries at the same time.[18]

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[18] Numerous commentators have recognized that a freewheeling use of *Chevron*, as exemplified in this case, effectively cedes legislative power to administrative agencies and is in sharp tension with the separation of powers. *See, e.g.*, 1 Laurence H. Tribe, *American Constitutional Law* § 5-19 (3d ed. 2000); Bernard Schwartz,

In this case, for example, the FCC used *Chevron* to endow itself with such wide-ranging authority that the 1996 Act would have run afoul of the nondelegation doctrine and

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Administrative Law § 10.31 (3d ed. 1991) (warning that *Chevron* must not be abused to enable agency to "bootstrap itself into an area in which it has no jurisdiction"); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 279 (1998) (warning that, "in the case of administrative interpretation of statutes, majoritarian principles arguably provide greater support for judicial intervention than acquiescence"); Thomas J. Byrne, *The Continuing Confusion over Chevron: Can the Nondelegation Doctrine Provide a Partial Solution?*, 30 Suffolk U. L. Rev. 715, 717 (1997) (noting interplay between *Chevron* and nondelegation principles); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 186 (1994) ("The nondelegation doctrine, as administered by the Court today, might be in tension with *Chevron*, as understood by the Court today."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 456 (1989) (warning that some have been "seduc[ed]" by *Chevron*'s "siren song" into embracing a "vision of deference" that would require "substantially recasting" the separation of powers); Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 Cornell L. Rev. 1101, 1107 (1988) (warning that broad use of *Chevron* is problematic because "courts have a duty to supervise presidential policymaking"); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916, 982-84 (1988) (noting tension between *Marbury v. Madison* and aggressive use of *Chevron*); Sidney A. Shapiro & Robert L. Glickman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L.J. 819, 859 (cautioning that some courts have created an effective "presumption of statutory ambiguity" under *Chevron* because "few statutes are absolutely clear"); Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv. L. Rev. 421, 465 (1987) (if courts "give administrative interpretations extreme deference, there will be little or no judicial check on the executive's exercise of discretion in statutory interpretation"); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 Am. U. L. Rev. 1, 7 (1986) ("The trend toward judicial deference so evident in *Chevron* is troubling because it would lead to an erosion of the judiciary's duty: to ensure that the law is obeyed by all, including the agencies.").

the separation of powers had the statute truly been as devoid of direction as the FCC claimed.

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE MANIPULATION OF *CHEVRON* THAT THE COURTS OF APPEALS HAVE ALLOWED.

The decision in this case leaves agencies free to ferret out any hint of ambiguity in a statute so as to cloak their judgments in "*Chevron* deference." Given the imprecision inherent in the use of any word [19]—and the fact that Congress cannot (nor should it be expected to) define every word in a statute—agencies almost always can locate some purported ambiguity in any statute, and courts frequently acquiesce in such efforts to manufacture a basis for *Chevron* deference.[20] The result is uncertainty about the scope

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[19] *See Sullivan v. Everhart*, 494 U.S. 83, 106 n.7 (1990) (Stevens, J., dissenting) ("[T]he interpretative problems pending before us result from an imprecision inherent in . . . political language.").

[20] *See, e.g., Beverly Enters. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999) (agency determination that "charge nurses" were not "supervisors"); *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) (2-1) (agency interpretation of phrase "public lands"); *Yang v. Maugans*, 68 F.3d 1540 (3d Cir. 1995) (2-1) (agency interpretation of "entry"); *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995) (2-1) (agency interpretation of antidumping statute); *Archer-Daniels-Midland Co. v. United States*, 37 F.3d 321 (7th Cir. 1994) (2-1) (agency interpretation of tax statute); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 719 (1995) (Scalia, J., dissenting) (concluding that agency interpreted "harm" and "take" "in a manner repugnant to its ordinary and traditional sense"; majority accepted interpretation); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) (concluding that agency's statutory interpretation does not warrant deference because phrase "shall not be more restrictive than" is unambiguous; majority accepted interpretation); *see generally* Tribe, *supra* n.18, at § 5-19; Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 996-1006 (1999) (dis-

of even plainly written laws: Every statutory provision comes to be surrounded by a zone of "reasonableness" that deters private parties from (or, as here, punishes them for) engaging in good-faith conduct that is intended to obey the law but might be deemed to offend an agency's "reasonable" statutory construction. The unpredictable boundaries of this zone retard the development of new operational strategies, to the detriment of the nation's economy.[21] They also undermine the legitimacy of the administrative decisionmaking process by creating the appearance that outcomes are attributable not to objective *ex ante* rules of law but rather to the *post hoc* policy rationalizations of unelected agency officials.

The familiar *Chevron* standard subjects administrative decisionmaking to a two-step review process. If the intent of Congress is "clear" and "unambiguous," then the courts "must give effect" to that intent; deference to an agency's interpretation of the statute is not appropriate, and that

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cussing examples of agencies interpreting statutes to expand scope of their regulatory powers).

Some courts—and in particular this Court—have from time to time acted to rein in the agencies' efforts to manufacture ambiguity. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S. Ct. 927, 938-40 (1998) (holding that agency wrongly argued phrase "groups having common bond" was ambiguous); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (agency wrongly adopted expansive definition of phrase "modify any requirement"); *Beverly Enters. v. NLRB*, 165 F.3d 290, 294-96 (4th Cir. 1999) (en banc) (7-5) (agency erroneously concluded that "charge nurses" were not "supervisors" because "policy bias" led agency to adopt misguided application of phrase "independent judgment"); *Mississippi Poultry Ass'n v. Madigan*, 31 F.3d 293 (5th Cir. 1994) (en banc) (8-7) (agency erroneously interpreted phrase "the same" to mean "at least equal to").

[21] *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 Admin. L. Rev. 429, 434-35 (1999) (noting that predictability of agency decisionmaking allows private parties to plan and fosters investment).

interpretation stands or falls depending on whether it is legally consistent with the will of Congress. *See Chevron*, 467 U.S. at 842-43. If, however, a "statute is silent or ambiguous with respect to the specific issue" at bar, then courts presume that Congress has left it to the agency to resolve the question. *Id.* at 843. In such a case, courts must defer to the agency's statutory construction; "[a] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency." *Id.* at 843-44.

As experience over the last fifteen years demonstrates, *Chevron* deference makes it far easier for an agency's statutory construction to be upheld on judicial review.[22] By definition, moreover, a statute that is "ambiguous" or "silent" contains gaps that an agency has authority to bridge or fill. *See* 467 U.S. at 843-44, 865-66. Thus, an agency enjoys much greater latitude under step two of *Chevron* to exercise lawmaking authority and implement its own policy preferences and agenda. Administrative agencies therefore have a strong incentive to find ambiguity in every word Congress uses—even commonly used verbs that Congress heretofore saw no need to define.[23]

And so it was with the FCC in this case. Section 271 of the 1996 Act bans U S WEST (and the other BOCs) from "provid[ing] interLATA services" originating within its 14-state region without FCC approval. 47 U.S.C. § 271(a). Congress did not deem it necessary to define the term "provide"—just as it defined no other commonly used verbs in

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22 1 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 3.4 (3d ed. 1994) (noting statistical decrease under *Chevron* in number of reversals or remands of agency decisions).

23 *Compare* Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 828 (1990) (questioning why agencies argue that statute is clear "when it would have been rather easy to justify agency action" under step two of *Chevron*).

the Act. But this omission is hardly surprising. "Provide" is an everyday word that has a well-understood meaning.[24] Linguistic parsing aside, all the definitions identified in the proceedings below—"furnish," "make available," "supply," "offer," *see* App. 5a, 44a-45a—share a core meaning: They refer to putting forth a product or service oneself, as contrasted to performing ancillary services for another who is doing so. The woman or man on the street would have no trouble concluding that a telephone company "provides" telephone service while its marketing agent, or law firm, or accountant, does not. That core meaning is consistent with the use of "provide" throughout the 1996 Act and the Communications Act.[25] And in repealing the AT&T Consent Decree, the Act specifies exactly what services a BOC may not provide: "interLATA services," defined as "the transmission . . . of information" between the geographic regions known as LATAs. *See* 47 U.S.C. §§ 153(21), 153(43).

Thus, the straightforward interpretation of section 271(a) is that the BOCs may not serve (or stand ready to serve) the public's need to transmit information between LATAs. This understanding is consistent with the FCC's traditional interpretation of the term "provide."[26] Moreover, parallel provisions of the Act demonstrate that a ban on "provid[ing]" telecommunications services does

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[24] *See Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (relying on "ordinary meaning" of statutory language).

[25] *See, e.g.*, 47 U.S.C. §§ 201(a); 214(a), (e); 222(a), (b), (c); 223(c); 224(a), (d); 225(a), (d); 251(b), (c); 271(b), (c), (e); 273(a); 274(a); 275(a).

[26] For decades the FCC has adhered to the proposition that a "provider" of service either directly carries telecommunications traffic or indirectly serves the telecommunications needs of the public (e.g., by reselling transmission services bought from a wholesaler). *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC2d 261 (1976).

not bar the "marketing" of those services: Where Congress intended to regulate a carrier's ability to market particular services, it did so explicitly, without relying on a generic prohibition on "providing service" to ban "marketing" as well.[27] Prior to implementation of the Buyer's Advantage program, the Commission itself had relied on the distinction between marketing and providing when it interpreted the word "provide" in an almost-identical statutory context. The FCC read an analogous ban on the "provision" of alarm monitoring services by BOCs to reach arrangements that, *inter alia*, would give a BOC a "financial stake in the commercial success" of an unaffiliated provider of alarm monitoring services—but not to reach arrangements for joint sales and marketing, without more, between a BOC and an unaffiliated provider.[28]

U S WEST structured its relationship with Qwest in accordance with these statutory guideposts. Qwest, not U S WEST, was clearly identified in marketing materials as the carrier that would "furnish," "make available," "supply," "offer," or "provide" any interLATA services ordered by a Buyer's Advantage customer.[29] Qwest, not U S WEST, entered into the direct contractual relation-

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[27] *See* 47 U.S.C. §§ 222(c)(1), (d)(3) (distinguishing limitations on a carrier's use of information for "inbound marketing" from use of that information for "services necessary to, or used in, the *provision* of telecommunications services"); *id.* § 272(g)(2) (banning BOCs from "market[ing]" the services of affiliates if the BOCs could not provide those services under section 271); *id.* § 274(c)(1)(B) (barring the BOCs both from providing and from marketing electronic publishing services). *See generally Russello v. United States*, 464 U.S. 16, 23 (1983) (omission of particular language included in another section of same statute creates presumption that omission is intentional).

[28] *See Alarm Monitoring Order* ¶¶ 38-40.

[29] *See* JA 68, 120, 122-23, 128.

[30] *See* JA 69, 105, 302.

ship with the end-user customer.[30] Qwest, not U S WEST, received all the revenues generated by that relationship.[31] And Qwest, not U S WEST, performed all tasks related to transmitting its customers' information between LATAs.[32] The Buyer's Advantage program, in sum, was merely a marketing initiative that would permit U S WEST's local customers to enjoy the convenience of *ordering* local and long distance services at the same time; it was in no way a substitute for the ability (after section 271(d) approval) to "provide" (and be paid for "providing") long distance services directly to its customers. U S WEST therefore had every reason to believe that the Buyer's Advantage program fell well outside the scope of section 271(a) as *Congress* had written it (and the remaining provisions of the 1996 Act).

However, the marketing program did not fall outside the *FCC's* interpretation of section 271(a). The Commission brushed aside the definition of "interLATA services"; its earlier orders; the consistent statutory usage of the term "provide"; and the distinctions that Congress drew between a ban on "providing" service and one on "marketing" service. The agency considered the term "provide" in section 271(a) in isolation from all those signposts and declared it to be ambiguous based largely on its own belief that a straightforward reading of the provision was not consistent with the interpretation that it preferred. *See* App. 47a-48a, 53a-56a.[33]

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[31] *See* JA 69.

[32] *See* JA 69, 105, 302.

[33] *See, e.g.*, App. 45a (concluding that "the term 'provide' is ambiguous" "in the context of *our interpretation of section 271*") (emphasis added); App. 48a (concluding that the Act "must" be read "to encompass activities that, if otherwise permitted, would undermine" the BOCs' incentives to pursue section 271 approval).

Although conceding (as it had to do) that section 271 did not ban *all* forms of marketing, *see* App. 53a, the Commission determined nonetheless that an expansive interpretation of section 271 was necessary. The agency ruled that whether a BOC's actions constitute the "provision" of in-region long distance services turns not on the nature of those actions but on whether the BOC's "involvement" with the long distance market "reduc[es] its incentives to cooperate in opening its local market to competition" by enabling the BOC to obtain "competitive advantages" in any *other* market—including local service markets in which a BOC may lawfully compete. App. 54a. The Commission, furthermore, imposed its new interpretation retroactively, in a case of first impression, in an administrative enforcement proceeding that arose as a primary jurisdiction referral from a court action seeking damages and other relief from U S WEST.

The Commission's statutory construction is not only wrong. It is also impossible to see how the agency's "involvement"/"incentives" test could have been predicted in advance because the standard simply has no connection to the statute. "Involvement" is not a synonym for "providing," nor even an element of any of the definitions of the word "provide." The Commission's reliance on the concept of "involvement" finds no antecedent in any of the agency's prior decisions. The statutory distinction between "providing" and "marketing"—the latter plainly a kind of "involvement" in and of itself—is completely inconsistent with this concept.

The agency's emphasis on "incentives" is similarly unmoored from the statute. Unlike sections 251 and 252 of the Act, which *require* the BOCs to open their local markets in ways designated by Congress, *see* 47 U.S.C. §§ 251-252, the section 271(d) approval process is *voluntary*. Thus, the agency's decision to forbid behavior that

may reduce a BOC's incentives to pursue approval that the BOCs are not legally obligated to seek seems driven more by administrative frustration at the pace with which the BOCs have pursued section 271(d) relief than by any rational appraisal of the language of the Act. The "first mover's advantage" on which the D.C. Circuit relied in affirming the agency, *see* App. 7a, is likewise unconnected in any concrete way to the statutory ban on "provid[ing] interLATA service." And the remaining provisions of section 271 undermine the legitimacy of using "incentive" as a touchstone for the interpretation of section 271(a) by permitting the BOCs to "provide" at least ten inter-LATA services without pursuing FCC approval. *See* 47 U.S.C. §§ 271(b), (g). Finally, most of the incentive-reducing benefits to which the FCC points—for example, U S WEST's increased ability to sell additional local services, *see* App. 59a-60a, or increased satisfaction and loyalty among its local customers, *see* App. 58a-59a—relate to intrastate services that U S WEST lawfully provides and that fall outside the FCC's jurisdiction.

In interpreting section 271(a), the FCC did not choose from a range of possible meanings for the phrase "provid[ing] interLATA services." Rather, the Commission chose among alternative possible meanings of the phrase "getting involved in activities that may affect a BOC's incentives to apply for FCC permission to provide inter-LATA services." In section 271, Congress authorized the BOCs to seek FCC permission to provide long distance services but deliberately left it to the BOCs to decide whether to seek that permission or to go their own way without trying to provide long distance. The FCC took that ball and ran with it in a wholly different direction: It concluded that it would be good policy not to leave the decision whether to seek section 271 permission to the BOCs but instead to monitor their activities and to bar those activities that the agency thinks would reduce a

BOC's incentives to seek such permission. Not only is that entire direction one Congress never authorized, but it entails the agency's drawing lines between the incentive-reducing choices that will be barred and those that will be permitted—an enterprise for which Congress provided no guidance.[34] If *Chevron* means that an agency can do *this* in the name of statutory interpretation, then it means that an agency can make itself a junior varsity Congress, free to legislate (without even supplying its own limiting principles) just about any time Congress speaks.

Such unfettered license in adopting legal interpretations, particularly in enforcement actions, is not consistent with sound principles of statutory construction.[35] It creates such substantial uncertainty about the scope of private parties' legal obligations that review by this Court is warranted. This Court has recognized that the 1996 Act is a landmark statute that rewrote the legal rules for the telecommunications sector of the national economy. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 738 (1999). A lack of predictability about the extent of those rules will deter innovation as private parties opt for caution over new strategies or programs that may risk the FCC's wrath.[36] And the lower court's

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[34] The unpredictability engendered by the FCC's "incentives" test is highlighted by a subsequent ruling that distinguished the *Order* here so as to permit BOC marketing of prepaid long distance calling cards. The agency did so not because of some difference in the marketing activities at issue—indeed, in that case the BOC received some portion of the interLATA revenues—but because of the "limited" and "discrete" size of the "much smaller" prepaid card market. *See AT&T Corp. v. BellSouth Corp.*, 14 FCC Rcd 8515, at ¶¶ 27, 29 (CCB 1999).

[35] Although agencies generally have discretion to adopt statutory interpretations through adjudication or rulemaking, this Court has indicated that an agency may abuse that discretion by adopting new legal interpretations in a proceeding involving "fines or damages." *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974).

ruling that even "puzzling" and potentially "nonsensical" readings of the Act are shielded by *Chevron* deference, *see* App. 4a, 7a, will spur other agencies to even greater abuse of the *Chevron* framework.

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE CONFLICT THAT MISUSE OF THE *CHEVRON* FRAMEWORK CREATES WITH THE NONDELEGATION DOCTRINE.

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' U.S. Const., Art. I, § 1, and we have long insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (citation omitted). Although the heyday of the nondelegation doctrine has passed, *see Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), in recent years this Court has invalidated at least four delegations of congressional authority on related grounds. *See INS v. Chadha*, 462 U.S. 919 (1983) (Congress may not delegate power to one of its Houses); *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not delegate authority over other than purely internal matters to an officer answerable to it); *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (Congress may not delegate decisionmaking authority to airport "board of review" composed of nine members of Congress); *Clinton v. City of New York*, 524

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[36] *See supra* n.21.

U.S. 417 (1998) (Congress may not empower the President to exercise line item veto).

In order for an exercise of congressionally delegated power to be constitutional under the nondelegation doctrine, Congress must " 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.' " *Loving v. United States*, 517 U.S. 748, 771 (1996) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). In this case, the FCC manipulated *Chevron* to evade the fundamental limits of the nondelegation doctrine, and the D.C. Circuit acquiesced in that evasion.

Chevron deference is premised on the (implicit or explicit) delegation of authority to fill *"gap[s]"* in the law. *See Chevron*, 467 U.S. at 843-44, 865-66 (emphasis added). In *American Trucking Ass'n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *modified in part*, No. 97-1440 *et al.*, 1999 WL 979463 (D.C. Cir. Oct. 29, 1999), the D.C. Circuit recently acknowledged the troubling freedom of action that an agency possesses under *Chevron* when Congress has enacted little more than a vague statutory imperative to do good; in that case, the D.C. Circuit drew upon the nondelegation doctrine to impose limits on the agency's latitude.[37] *Compare Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). This case

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[37] In *American Trucking*, the D.C. Circuit found that the principle underlying a challenged EPA decision—that "lower exposure levels [to certain pollutants] are associated with lower risk to public health"—defined a range of permissible exposure levels that was reasonable. 175 F.3d at 1035-36. The court concluded, however, that nothing in EPA's reasoning justified the decision to pick a particular exposure limit or constrained its discretion to choose *any* limit within the range. Thus, EPA's statutory interpretation was tantamount to a declaration that it had the statutory authority

demonstrates a similar problem, but a far more troubling one—an agency's exploitation of the *Chevron* framework in the context of a statute that, far from being too vague, is too precise for the FCC's liking. The principles of separation of powers that drive the nondelegation doctrine therefore should apply *a fortiori* to limit *Chevron* deference in this case.

Section 271(a), as written by Congress, targets a narrow class of specified activities: The BOCs are forbidden to "provide interLATA services." As discussed above, those words mean something, both as part of the 1996 Act ("interLATA service" is defined to be the transmission of information between LATAs) and in common usage ("provide" is not a regulatory term of art). Far from filling gaps (even large ones like those that troubled the D.C. Circuit in *American Trucking*), the Commission used what Congress had enacted as a launch pad for its own policies to go beyond the actual language and framework of the statutory prohibition.

The result is an "interpretation" that asserts the Commission's authority to adjudicate the legality of a BOC's conduct solely on the basis of the agency's case-by-case review of the "involvement" a BOC will have in the long distance market and the resulting "incentives" for that BOC to seek FCC approval under section 271(d). The FCC has identified no intelligible principle in the statute

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to "do nothing at all," to "send industry . . . hurtling over [the brink of ruin]," or anything in between. *Id.* at 1037. In effect, EPA had drained the statute of any substantive content attributable to Congress and arrogated to itself the power to choose substantive rules to fill the void created by its own statutory interpretation—thereby calling into play the nondelegation doctrine. *See id.* at 1037-38. Consistent with the rule of constitutional avoidance, the D.C. Circuit remanded the case to the EPA for the agency's reconsideration. *See id.* at 1038.

or elsewhere to guide its discretion in the application of its newfound test—no offsetting consideration to the policy of maximizing the BOCs' incentives to seek section 271(d) approval that might constrain the reach of the agency's policy preference in pressuring the BOCs into satisfying the agency's prescribed criteria for obtaining such approval. Under the FCC's view, it is free to adhere to any principle—or no principle at all—in furthering that policy preference.

The range of activities falling within the scope of the FCC's test demonstrates the absence of the guiding principle required by the nondelegation doctrine. That range includes two activities—in which U S WEST indisputably has not engaged—that fall within any understanding of the statutory language: the contractual provision of long distance services directly to customers [38] or a teaming agreement that pays a BOC a percentage of an "unaffiliated" carrier's long distance revenue.[39] But the FCC's test also reaches conduct that the FCC does not or even cannot regulate in other contexts: the sale of local calling features (like voicemail) that are subject to state jurisdiction [40] and billing and collection services that the FCC has detariffed.[41] Indeed, the only activity that the Commission identified as falling outside the scope of section 271—the anonymous provision of back-office telemarketing—relates to neither local nor long distance telecommunications and in fact has never been found to come

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38 That particular activity would plainly constitute the provision of interLATA service under any interpretation of section 271(a)—but U S WEST did not engage in anything like that in this case.

39 *See* App. 59a-60a. Here, U S WEST received no percentage of the long distance revenues paid to Qwest.

40 *See* App. 59a-60a.

41 *See* App. 66a-67a.

within the Commission's regulatory authority at all.[42] In practice, therefore, the agency has given itself a roving mandate to select virtually any way of maximizing the BOCs' incentives to seek section 271(d) approval.

The FCC's ability to shape its understanding of the statutory term "provide" to fit its own policy preferences to achieve a desired result demonstrates that the agency has manipulated the *Chevron* framework to arrogate to itself the full extent of Congress' legislative power. What the statute says has been supplanted by the Commission's perception of what the law should be. The agency's assumption of legislative power not only replaces a legal system traditionally dominated by statutory law (and the common law) with a regulatory scheme governed by the agency's rules. It also consolidates legislative and adjudicatory authority in a single institution,[43] thereby substantially undermining the efficacy of judicial review. In a system in which the law can change with each application of a formless "incentives" test, meaningful review is almost impossible. The result is a wholly new legislative framework dictated by administrative fiat.

The limited delegation of "gap-filling" authority recognized by *Chevron* was never intended to run afoul of the nondelegation doctrine or to raise fears about "delegation run riot."[44] Indeed, the principle of constitutional avoidance dictates that any delegation should, if at all possible, be construed less broadly. *See, e.g., National Cable Television Ass'n v. United States*, 415 U.S. 336, 343 (1974). Nor was the *Chevron* framework intended to allow

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[42] *See* App. 68a.

[43] As noted above, the FCC's interpretation of section 271(a) was adopted in a complaint proceeding adjudicated by the agency.

[44] *See A.L.A. Schechter Poultry Corp.*, 295 U.S. at 553 (Cardozo, J., concurring).

administrative agencies to rewrite the laws passed by Congress. The principle underlying *Chevron* is that unelected courts have no mandate to question the policy choices of the executive's agents, *see Chevron*, 467 U.S. at 865-66; still less, however, should those agents elevate their policy preferences above those codified by Congress. Yet these results have come to pass. The Court therefore should grant certiorari to restore discipline and order to the administrative legal framework and to confine the reach of *Chevron* deference in the face of agency efforts to manipulate that deference by manufacturing ambiguities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 22, 1999

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 3, 1999 Decided June 8, 1999

No. 98-1468

U S WEST COMMUNICATIONS, INC., *et al.*,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AT&T CORPORATION, *et al.*,
Intervenors

Consolidated with Nos. 98-1469, 98-1471

On Petitions for Review of an Order of the
Federal Communications Commission

Before: SILBERMAN, WILLIAMS and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: Until various conditions relating to competition in local ("intraLATA") telephone

service are satisfied, the Telecommunications Act of 1996 generally bars each Bell operating company ("BOC") from providing long distance ("interLATA") service originating in the region where it provides local service:

> Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

§ 271(a) of the Communications Act, 47 U.S.C. § 271 (a).

In May 1998 two of the BOCs, U S WEST and Ameritech, announced deals with Qwest Communications Corporation under which each BOC would market Qwest's long distance service to its customers. Each BOC employed a special label for the resulting package ("Buyer's Advantage" for U S WEST, "CompleteAccess" for Ameritech); each offered the customer "one-stop shopping" for both local and long distance, with all customer support (sign-up and servicing) through the BOC's own toll-free number. Qwest was to compensate each BOC with a fixed fee for every customer obtained.

Competitors of Qwest in the long distance market filed complaints in two federal district courts, which referred them to the FCC. The Commission invited the filing of administrative complaints, which duly followed. The Commission held adjudicative proceedings and ultimately issued the order under review here, finding the agreements in violation of § 271. *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 21 438 (1998). U S WEST, Ameritech, and Qwest petitioned for review.

The statutory term "provide" appears to us somewhat ambiguous in the present context. The Commission believes that the disputed arrangements would give the two BOCs positions in the market for local and long distance

service that would greatly advantage them once they become explicitly entitled to provide long distance service. Given the reasonableness of that belief, and its relation to the overall purposes of the Act, we find the Commission's interpretation here permissible.

* * * *

As we said, § 271 says that a BOC may not "provide interLATA services except as provided in this section." Exceptions in the Act allow several forms of interLATA service immediately; the rest—including the sort of service at issue here—is permitted, on a state-by-state basis, only upon application and FCC approval pursuant to § 271(d). See generally *SBC Communications Inc. v. FCC*, 138 F.3d 410, 412-14 (D.C. Cir. 1998) (explaining history and structure of § 271(c)-(d)). Neither U S WEST nor Ameritech has received § 271(d) approval for any state: each is therefore subject to the general § 271(a) prohibition.

Under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), we of course honor Congress's clearly expressed answer to the "question" confronted by the agency. See *id.* at 842-43. Petitioners claim that § 271(a)'s ban clearly cannot apply to *any* marketing arrangements; as the two Qwest arrangements are a form of marketing, they reason that the Commission necessarily erred in its expansive view of "provide."

Petitioners base this claim on § 272 of the Act . It requires that each BOC, even after receiving § 271(d) approval, provide most interLATA services only through a separate affiliate. See 47 U.S.C. § 272(a). Further, § 272(g)(2) places the following restriction on the BOC and its affiliate:

> A Bell operating company may not market or sell inter-LATA service provided by an affiliate required

> by this section within any of its in-region States until such company is authorized to provide inter-LATA services in such State under section 271(d) of this title.

Id. § 272(g)(2). The BOCs argue that since this section prevents them from marketing the interLATA service of an *affiliate* until they receive the go-ahead under § 271(d), it carries a clear implication that they may, before that date, market the interLATA services of a non-affiliate such as Qwest. The Commission agreed—to the extent of reading § 272(g)(2) as showing that the forbidden "provi[sion]" of § 271(a) cannot cover *all* marketing relationships. See 13 FCC Rcd at 21,463, ¶ 32. But some arrangements that are marketing in the conventional sense of the word, it thought, could also qualify as provision of service forbidden under § 271(a). See *id.* at 21,463-64, ¶ 33.

Addressing this precise question first, we think it plain that the Commission's reading of the two sections has not led it into any logical contradiction. So long as there remains some non-trivial range of marketing of non-affiliate services that does not fall under the § 271(a) ban, the Commission preserves some scope for § 272(g)(2)'s implicit authorization. The BOCs argue that the Commission in fact leaves no such room, pointing to language in the Order saying that although a BOC could offer its marketing services to a long distance supplier, it could not "represent[ ] that [the marketed] product or service is associated with its name or services." *Id.* at 21,474, ¶ 50. Thus the Commission's view would, they say, allow a marketing arrangement only if it "has no conceivable business purpose." The exact meaning of "associated with its name or services" is not before us, but we read the phrase together with the Commission's expression of concern about

the BOCs' developing a "first mover's advantage" over long distance carriers in the as yet undeveloped full-service market. *Id.* at 21,467-68, 21,473, ¶¶ 40-41, 49. Thus, although the Commission's view bars the BOCs from taking advantage of some of the synergies that their marketing of interLATA service might exploit, it cannot be said to cut the implicitly permissible marketing down to zero or its functional equivalent. For example, the Commission's decision explicitly allows a BOC to offer the services of its marketing department for sale of interLATA services, subject to the proviso noted above. The Commission cannot be said to have squeezed the life out of § 272(g)(2)'s implied permission. Thus, the BOCs' argument from § 272(g)(2) doesn't compel the narrow reading they claim for § 271(d).

Nor are there other reasons to suppose Congress clearly intended such a narrow interpretation. Unlike numerous other terms in the Telecommunications Act of 1996, neither the word "provide" nor the phrase "provide interLATA services" is anywhere defined in the Act. Cf. 47 U.S.C. § 153 (definitions). "InterLATA service" *is* defined—as "telecommunications between a point located in a local access and transport area and a point located outside such area," *id.* § 153(21)—but that doesn't help: the definition does not specify some necessary relation of an actor to such telecommunications. Nor do any of the various ordinary meanings of "provide" appear necessarily superior in this context. See 13 FCC Rcd at 21,460, ¶ 27 (comparing dictionary definitions).

Petitioners also point to numerous other places where the Act uses the term "provide" or its cognates, see 47 U.S.C. § 153(44) ("provider of telecommunications services"); *id.* § 153(45) ("provide telecommunications services"); *id.* § 271(c) ("providing access and interconnec-

tion"); *id.* § 272(a) ("provide" various services, including interLATA services); *id.* § 275 ("provision of alarm monitoring services"), arguing that the Commission's assignment of narrow meanings to "provide" in those instances compels equal narrowness here. But although we normally attribute consistent meanings to statutory terms, "[i]dentical words may have different meanings where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different." *Weaver v. USIA*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (internal quotation omitted). As the Commission noted, no other section besides § 271(a)-(b) uses "provide" to describe a restriction on BOCs' entry into a market where the lifting of the restriction depends on the BOCs themselves. 13 FCC Rcd at 21,462, ¶ 30. A narrow reading would thus tempt the BOCs to defer conduct that Congress hoped to accelerate—acts facilitating the development of competition in the intraLATA market.

FCC's reading of "provide" to include the BOCs' actions here, moreover, appears clearly reasonable in the specific context of § 271. See *Chevron*, 467 U.S. at 845. As the Commission noted, § 271 both gives the BOCs an opportunity to enter the long-distance market and conditions that opportunity on the BOCs' own actions in opening up their local markets. See 13 FCC Rcd at 21,645, ¶ 36. The Commission viewed the powerful incentive set up by this scheme as shedding light on the market entry prohibition:

> [I]n order to determine whether a BOC is providing interLATA service within the meaning of section 271, we must assess whether a BOC's involvement in the long distance market enables it to obtain com-

petitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition.

Id. at 21,465, ¶ 37.

This seems reasonable as a general approach. Of course too-broad a notion of "competitive advantage" or "incentive" could make it nonsensical, turning it into an excuse to stifle the BOCs at every opportunity. But the FCC found that the arrangements here would have afforded the BOCs in question a serious advantage, namely a "first mover's advantage" over any non-BOC firms hoping to secure a position in the anticipated full-service market. See *id.* at 21,467-68, 21,473, ¶¶ 40-41, 49. By offering one-stop shopping for local and long distance under their own brand name and with their own customer care, see *id.* at 21,466, ¶ 38, U S WEST and Ameritech could build up goodwill as full-service providers, positioning themselves in these markets before § 271 allows them actually to enter. There appears to have been specific congressional concern over the impact of jointly marketed local and long distance service; this is manifested in the § 271(e) rule barring the major interLATA carriers from jointly marketing their interLATA service with local service obtained from a BOC, for three years or until the BOC in question gains access to the long distance market under § 271, whichever is first. See *id.* at 21,473-74, ¶ 49; 47 U.S.C. § 271(e)(1). If the BOCs could secure this advantage without opening their local service markets, the blunting of the intended incentive would be considerable—or so the Commission could reasonably find.

Petitioners seek to press the § 271(e) likeness further. They note that the Commission, despite what they claim is an incentive structure similar to § 271(a)'s, relied on the First Amendment in allowing long distance carriers covered by § 271(e) to engage in certain advertising ac-

tivities paralleling what is forbidden here. See *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22,040-41, ¶¶ 279-80. But § 271(e) allows the long distance carriers to (1) offer and market separately their long distance service plus resold BOC services, and (2) offer and market jointly their long distance service and local service not based on resold BOC services. In that context, the Commission allowed a covered carrier to proclaim its offers both of long distance and of resold BOC local service in a single ad, so long as it did not offer such service as a "bundle" or otherwise with "one-stop" shopping. *Id.* In short, it let them truthfully advertise the services they could lawfully provide, but no more. As the BOCs are *barred* from providing interLATA service until they have surmounted the § 271(d) hurdles, the present case presents no real analogy.

Context also explains the Commission's application of the "engage in the provision of alarm monitoring" language of § 275. The Commission and the petitioners spar over whether the Commission's approach here is genuinely different, but we need not resolve the clash, as the differences in the statutory contexts justify different outcomes. See 13 FCC Rcd at 21,462-63, ¶ 31. Incentives are not as crucial in a situation where the business prohibition will be lifted in a fixed time, as they will for alarm monitoring, see 47 U.S.C. § 275(a)(1), as where its duration depends on the BOC's own actions.

The Commission's action here of course does not represent a complete demarcation of the border between permitted marketing and forbidden provision. That is entirely reasonable. Apart from the Commission's general authority to choose between adjudication and rulemaking, see *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294

(1974), it makes sense for it to proceed through case-by-case judgments of a questioned action's likely effect—whether, for example, the marketing materials will cause consumers to identify the services with the BOC. While—as we've noted—some of the Commission's language on incentives is rather broad, it is not inconsistent with future judgments balancing the interests that are relevant under § 271(a). We are also puzzled by the Commission's concern that the two BOCs in each instance laid down the terms for the transaction, which Qwest humbly accepted. 13 FCC Rcd at 21,449-50, 21,452, ¶¶ 10, 14. As the BOCs had unique advantages to offer Qwest, this course of events was hardly surprising; we cannot see that the issue of who first proposed what to whom has much bearing on the policy values at stake. But the Commission's detours on the subject do not appear to have played a decisive role in its decision.

Petitioners also assert a want of substantial evidence. They regard the Commission's ultimate finding as belied by Qwest's repeated identification in the BOCs' marketing materials as the long distance provider. But that identification is still consistent with the view that the materials as a whole would lead consumers to link long-distance service to the BOCs, particularly as long distance was offered only as part of a full-service package with a BOC brand name. Nor does it appear that the FCC, by pointing to various activities characterized as "typically performed by those who resell interLATA services," 13 FCC Rcd at 21,471-73, ¶¶ 46, 48, was somehow suggesting that the ultimate finding of "provider" status depended on an intermediate finding of "reseller" status; petitioners' arguments that they are not *actually* resellers are thus misguided.

The petitions are

Denied.

APPENDIX B

Federal Communications Commission FCC 98-242

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. E-98-41

In the Matter of

AT&T CORPORATION, *et al.*,
Complainants,
v.

AMERITECH CORPORATION,
Defendant, and

QWEST COMMUNICATIONS CORPORATION,
Defendant-Intervenor;

File No. E-98-42

AT&T CORPORATION, *et al.*,
Complainants,
v.

U S WEST COMMUNICATIONS, INC.,
Defendant, and

QWEST COMMUNICATIONS CORPORATION,
Defendant-Intervenor;

File No. E-98-43

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., *et al.*,
Complainants,
v.

U S WEST COMMUNICATIONS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1998;
Released to the Parties: September 28, 1998;
Released to the Public: October 7, 1998

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order, we resolve three formal complaints brought by several interexchange and competitive local exchange carriers (complainants)[1] that challenge the lawfulness of two separate business arrangements between Ameritech Corporation (Ameritech) and Qwest Communications Corporation (Qwest), and

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[1] Complainants AT&T and MCI Telecommunications Corporation (MCI) are interexchange carriers (IXCs) engaged in the provision of interLATA telecommunications servicse as well as other telecommunications and non-telecommunications services. InterLATA service is defined by the Act as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). Complainant Association of Local Telecommunications Services (ALTS) is a non-profit trade association comprised of companies that construct and operate local telecommunications networks and that use those networks to provide local exchange services in competition with incumbent local exchange carriers. Complainant MGC Communications, Inc. (MGC) is a provider of both local exchange and interLATA telecommunications services as well as other telecommunications and non-telecommunications services. Complainant Time Warner Communications Holdings, Inc. (Time Warner) is a provider of competitive local exchange and exchange access service as well as other telecommunications and non-telecommunications services. Complainants NEXTLINK Illinois, Inc. and NEXTLINK Ohio, L.L.C. (collectively NEXTLINK) are facilities-based competitive local exchange carriers who compete with Ameritech. Complaint, AT&T, MCI, ALTS, MGC, Time Warner, and NEXTLINK v. Ameritech Corporation (Ameritech) File No. E-98-41 (filed June 15, 1998) (AT&T Complaint (Ameritech)) at 4-5. Complainants McLeodUSA Telecommunications Services, Inc. (McLeodUSA), ICG Communications, Inc. (ICG), and GST Telecom, Inc. (GST) are providers of local exchange and interLATA telecommunications services, as well as other telecommunications and non-telecommunications services. Complaint, McLeodUSA, ICG, and GST v. U S WEST, File No. E-98-43 (filed June 19, 1998) (McLeodUSA Complaint (U S WEST)) at 1.

between U S WEST Communications, Inc. (U S WEST) and Qwest.[2] We are asked to decide whether, consistent with sections 271 and 251(g) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,[3] defendants can provide under their own brand names a combined package of services, which includes Qwest's long distance service, prior to demonstrating that their local service markets have become open to competition. The evidence demonstrates that Ameritech and U S WEST (a) designed and developed a package of services that would include a long distance service component; (b) selected the carrier to transmit the long distance service; (c) established, and exercised prospective control over, the price, terms, and conditions under which the long distance component would be offered; (d) served as the initial and primary point of contact for the customer for all service inquiries for the combined offiering; (f) relied on their brand names in marketing the combined

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[2] Ameritech and U S WEST (defendants) are Bell operating companies (BOCs). 47 U.S.C. § 153(4) (defining "Bell operating company"). Ameritech provides local exchange and exchange access services in five Midwestern states. U S WEST provides local exchange and exchange access services in a region comprised of 14 Western states. Defendant-Intervenor Qwest is a facilities-based provider of multimedia communications services to interexchange carriers, other communications entities, businesses, and consumers. Qwest provides facilities-based services in 11 states, operates as a switch-based reseller in 37 other states, and competes directly with certain of the Complainants in the provision of interLATA services. Motion of Qwest Communications Corporation for Leave to Intervene, File No. E-98-41, at 3 (Qwest Motion to Intervene (Ameritech)).

[3] 47 U.S.C. §§ 271, 251(g). The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et. seq.*, amended the Communications Act of 1934 (Communications Act or Act). References to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), will be referred to as the "1996 Act."

offering; and (g) expressly recommended Qwest's long distance service.[4] We conclude, based on this record, that, although certain limited marketing arrangements are permissible under the Act, Ameritech and U S WEST are providing in-region, interLATA service without authorization, in violation of section 271 of the Act.[5] We further conclude that, as discussed below, although the underlying arrangements raise considerable concerns that Ameritech and U S WEST may have violated their equal access and nondiscrimination obligations under section 251(g) of the Act,[6] we need not reach the issue because we have found that the arrangements violate section 271.

2. Our actions today do not upset the specific long distance offering available to consumers through these business arrangements in the short term. Indeed, Qwest may still independently offer its long distance service to consumers at the same prices available under the Ameritech and U S WEST business arrangements. By restricting U S WEST's and Ameritech's involvement in the long distance market, however, we further Congress' intent to withhold from the BOCs the authority to enter the long distance market until they have opened their local markets to competition. Because neither Ameritech nor U S WEST has satisfied the market-opening criteria established

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[4] Unless otherwise stated, the term "long distance" means "in-region, interLATA." In-region interLATA services are interLATA services that originate within a BOC's in-region states. 47 U.S.C. § 271(b)(1). Out-of-region, interLATA services, are interLATA services that originate outside of a BOC's in-region states. 47 U.S.C. § 271(b)(2). In-region states are defined as states in which a BOC was authorized to provide exchange services under the MFJ. 47 U.S.C. § 271(i)(1).

[5] 47 U.S.C. § 271.

[6] 47 U.S.C. § 251(g).

by Congress, we are required to prohibit their involvement in the long distance market under the arrangements with Qwest at issue here. Thus, our decision preserves the careful balance struck by Congress in the 1996 Act and thereby ensures that consumers will enjoy the long term benefits of true competition among telecommunications providers and telecommunications service offerings.

A. Statutory Framework

3. Prior to the 1996 Act, the service offerings of the BOCs, including Ameritech and U S WEST, were governed by the Modified Final Judgement (MFJ or Consent Decree).[7] Arising from the settlement of the Department of Justice's antitrust suit against AT&T, the MFJ required the divestiture of the BOCs from AT&T and prohibited the BOCs from entering certain lines of business, including interexchange service.[8] These line-of-business restrictions were based upon the theory that, if the BOCs were allowed to enter the long distance market, they could use

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[7] *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Western Elec.*, Civ. Action No. 82-0192 (D.D.C. Apr. 11, 1996) (terminating the MFJ as of February 8, 1996). Local exchange areas were created by the BOCs pursuant to criteria set forth in the MFJ, and came to be known as LATAs (local access and transport areas). *See* 47 U.S.C. § 153(25) (defining "local access and transport area").

[8] 552 F. Supp. at 188. *See also SBC Communications Inc. v. FCC*, 138 F.3d 410, 413 (D.C. Cir. 1998). These are referred to as the line-of-business restrictions, section II.D. of the MFJ. Although prohibiting the provision of interexchange services, the MFJ did not bar BOCs from providing intraLATA toll services. The MFJ was focused on the market power of the BOCs in the local exchange market and the anticompetitive impact of that power in the long distance market. Unlike the 1996 Act, the MFJ was not concerned with bringing competition to local exchange markets.

their bottleneck control in the local and exchange access markets to obtain an unfair advantage in the long distance market.[9] The MFJ also required the BOCs to provide exchange access services, which are necessary to originate or terminate an interexchange service, that are "equal in type, quality, and price" among the interexchange carriers.[10] This requirement responded to the government's contentions that, in interconnecting their local networks with the long distance networks of the various interexchange carriers, the BOCs provided inferior interconnection to AT&T's competitors. Although the MFJ Court recognized that, after divestiture, the BOCs would not have the same incentive to favor AT&T as before, the court found that a "substantial AT&T bias" had been designed into the network.[11] The court therefore found that it was imperative that any disparities in interconnection be eliminated so that all interexchange and information service providers would be able to compete on an equal basis.[12] In addition, the MFJ prohibited the BOCs from discriminating between AT&T and its affiliates and their products and services and other carriers and their products and services in the interconnection and use of the BOCs' telecommunications services and facilities or in the BOCs' charges for service.[13]

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9 552 F. Supp. at 185.

10 *Id.* at 196 (citing section II.A of the MFJ); *see also United States v. Western Elec.*, 846 F.2d 1422, 1427 (D.C. Cir. 1988). This is referred to as the equal access obligation, section II.A of the MFJ.

11 552 F. Supp. at 195.

12 *Id.*

13 552 F. Supp. at 227. This is referred to as the nondiscrimination obligation, section II.B. of the MFJ.

4. Congress overhauled many aspects of federal regulation of communications services with the passage of the Telecommunications Act of 1996. In particular, Congress chose to modify the line-of-business restrictions established under the MFJ. In enacting the Telecommunications Act of 1996, Congress established a pro-competitive and deregulatory framework designed to benefit "all Americans by opening all telecommunications markets to competition."[14] Congress sought to foster this competition by fundamentally changing the conditions and incentives for market entry and by attempting to break any remaining local service bottlenecks.[15] As a result, the 1996 Act sets the stage for a new competitive regime in which carriers in previously segmented markets will be able to compete in a dynamic and integrated telecommunications market that promises lower prices and more innovative services to customers. Central to the new statutory scheme, and expressly departing from prior jurisprudence developed under the MFJ,[16] are provisions designed to open the local serv-

[14] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement) (emphasis added). *See SBC Communications, Inc. v. FCC*, 138 F.3d at 413.

[15] *See BellSouth Corp. v. FCC*, 144 F.3d 58, 61 (D.C. Cir. 1998) ("The 1996 Act rescinded the MFJ . . . and changed the entire telecommunications landscape.").

[16] Section 601 of the 1996 Act states that the "restrictions and obligations" imposed by the AT&T Consent Decree shall, as of February 8, 1996, give way to the "restrictons and obligations imposed by [the Act]." Pub. L. 104-104, Title VI, § 601(a)(1), Feb. 8, 1996, 110 Stat. 143 (codified at 47 U.S.C. § 152 note). Section 601(a)(1) provides, in pertinent part:

> Any conduct or activity that was, before the date of enactment of [the 1996 Act], subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by [the 1996 Act]

ices market to competition and ultimately to permit all carriers, including those that had previously enjoyed a monopoly or competitive advantage in a particular market, to provide a combined telecommunications offering that includes both local and long distance services.

5. Congress set forth a particular framework and process through which entry will occur. Specifically, sections 251,[17] 252,[18] and 253 [19] remove legislative and regulatory impediments to competition, particularly in the local telephone market, and generally seek to reduce inherent economic and operational advantages possessed by incumbent local exchange carriers (LECs).[20] Toward this end, sections 251 and 252 impose specific market opening

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and shall not be subject to the restricitons and the obligations imposed by such Consent Decree.

Id.

[17] 47 U.S.C. § 251.

[18] 47 U.S.C. § 252.

[19] 47 U.S.C. § 253.

[20] H.R. Conf. Rep. No. 104-458, at 1 (1996). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15612, 15658 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively, *Iowa Utils. Bd.*), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *aff'd, Southwestern Bell Telephone Co. v. FCC*, —— F.3d ——, 1998 WL 459536 (8th Cir., Aug. 10, 1998) ***further recons. pending.***

mechanisms, such as mandatory interconnection,[21] unbundling[22] and resale requirements,[23] on all incumbent LECs, including Ameritech and U S WEST, in order to break the incumbent LECs' bottleneck control over local facilities. Due to the continued and extensive market dominance of the BOCs in their regions, Congress chose to maintain many of the MFJ's restrictions on the BOCs, until the BOCs open their local markets to competition as provided in various sections of the Act.[24] In section

[21] Incumbent LECs are required to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with its network at any technically feasible point that is at least equal in quality to that provided to itself (or its subsidiary), and on rates, terms and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(2).

[22] Incumbent LECs are required to provide to any requesting carrier nondiscriminatory access to network elements on an unbundled basis in a manner that allows the requesting carriers to combine such elements in order to provide telecommunications service. 47 U.S.C. § 251(c)(3).

[23] Incumbent LECs are required to offer for resale at wholesale rates any telecommunications service that they provide at retail to non-carrier subscribers, and have a duty not to prohibit or to impose unreasonable limitations on the resale of such telecommunications services. 47 U.S.C. § 251(c)(4).

[24] *See, e.g.*, 141 Cong. Rec. S8057 (1995) (statement of Sen. Dorgan):

> The Bell operating companies are not now free to go out and compete with the long distance companies because they have a monopoly in most places in local service. It is not fair for the Bell operating companies to have a monopoly in local service, retain that monopoly and get involved in competitive circumstances in long distance service.

Accord, S. 652, 104th Cong., § 5(3) (1995) ("[b]ecause of their monopoly status, local telephone companies and the [BOCs] have been prevented from competing in certain markets") (emphasis added). *See also* 141 Cong. Rec. S8138 (1995) (statement of Sen. Kerrey) ("[t]he question is whether or not to grant long-distance competitive opportunity, and that question is answered by deter-

271, for example, Congress prohibited the BOCs from entering the in-region, interLATA market immediately.[25] Instead, Congress set forth in section 271 a checklist of market-opening criteria and other requirements that a BOC must satisfy before it may enter the in-region, interLATA market.[26] Section 271 contemplates that to

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mining whether or not there is competition at the local level"); 141 Cong. Rec. H8281 (1995) (statement of Rep. Bliley) ("[o]nce the [BOCs] open the local exchange networks to competition, the Bell companies are free to compete in the long distance and manufacturing markets"). *See also BellSouth Corp. v. FCC*, 144 F.3d at 61 ("In general these provisions simply maintained, and in most cases loosened, various restrictions to which the BOCs were already subject under the MFJ.").

[25] The court recounted in *SBC Communications v. FCC* that:

> [T]he question of how best to achieve th[e] goal [of opening all markets to competition], however, was the subject of great debate. Some thought that the local and long distance markets should be open to all competitors immediately. Others believed that the BOCs should have to wait until actual competition was introduced in their local markets before providing interLATA service, since it was claimed that the long-distance market is already competitive. As might be expected for an issue of this economic significance, an extended lobbying struggle ensued. The end product was a compromise between the competing factions.

138 F.3d at 413.

[26] Section 271 establishes particular criteria that the BOC must satisfy in order to receive authorization to enter the in-region, interLATA market for a particular state in its region. Specifically, a BOC must show that it satisfies the requirements of either section 271(c)(1)(A), known as "Track A," or section 271(c)(1)(B), known as "Track B." To proceed under Track A, a BOC must show that it "is providing access and interconnection" under a duly approved interconnection agreement to "one or more unaffiliated competing providers of telephone exchange service [other than exchange access] to residential and business subscribers" that offer their services either "exclusively" or "predominantly" over their own facilities. 47 U.S.C. § 271(c)(1)(A). To proceed under Track B, a BOC must show that "no such provider has requested the access

permit the BOCs' immediate entry into the long distance market would allow the BOCs to leverage their bottleneck control in the local market into the long distance market and thus both threaten competition in the long distance market and entrench their monopoly in the local market. Moreover, Congress recognized that, unless the BOCs had some affirmative incentive to open their local markets to competition, it would be highly unlikely that competition would develop expeditiously in the local exchange and exchange access markets. Accordingly, section 271(a) allows a BOC to enter the in-region, interLATA market, and thereby offer a comprehensive package of telecommunications services (*i.e.*, one-stop shopping for local and long distance service), only after it demonstrates, among other things, compliance with the interconnection, unbundling, and resale obligations that are designed to facilitate competition in the local market.[27] Congress

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and interconnection described in [Track A]" at least three months prior to the BOC's section 271 application. A BOC that has received such requests may still proceed under Track B if the state commission of the applicable state certifies that the only parties making those requests have failed either to negotiate in good faith or to comply with an implementation schedule contained in an interconnection agreement. 47 U.S.C. § 271(c)(1)(B). Depending on whether the BOC is proceeding under Track A or Track B, the BOC must show that it has "fully implemented" or is "generally offer[ing]" each of the fourteen items specified in the competitive checklist. 47 U.S.C. §§ 271(d)(3)(A), 271(c)(2)(B).

[27] In order for the Commission to grant a BOC's section 271 application, the Commission must also find that the requested authorization will be carried out in accordance with the requirements of section 272, and that the BOC's entry into the in-region, interLATA market is "consistent with the public interest, convenience, and necessity." 47 U.S.C. §§ 271(d)(3), 272. Section 272 seeks to diminish any remaining post-entry competitive risks by requiring an authorized BOC to provide long distance services only through a separate affiliate that is subject to particular safeguards. The Commission implemented the safeguards Congress enacted in section

thus chose to forego whatever short term benefits might result from immediate BOC entry into long distance, and instead decided to use the promise of long distance entry as an incentive to prompt the BOCs to open their local markets to competition. Separately, section 251(g) requires the BOCs, both pre- and post-entry, to treat all interexchange carriers in accordance with their preexisting equal access and nondiscrimination obligations, and thereby neutralize the potential anticompetitive impact they could have on the long distance market until such time as the Commission finds it reasonable to revise or eliminate those obligations.[28]

6. Congress also sought to encourage the BOCs to open their markets expeditiously by enacting section 271(e).[29] This section creates a three-year period during

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272, governing entry by the BOCs into new markets, including long distance, through separate affiliates in *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *petition for review pending sub nom. SBC Communications v. FCC*, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), *recon. pending*; *see also Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996), *recon. pending*.

[28] Section 251(g) provides in pertinent part: "each local exchange carrier [] shall provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier [prior to enactment of the 1996 Act]." 47 U.S.C. § 251(g). *See* discussion *infra* at part III.B.

[29] 47 U.S.C. § 271(e).

which the large interexchange carriers are prohibited from offering combined packages of long distance and resold BOC local services in states where the BOC has not received authorization to provide long distance services.[30] Once this three-year period expires, however, BOCs that have not opened their local markets sufficiently to obtain section 271 approval may not offer a combined package of services that includes a long distance service component and may face competition from large IXCs that are permitted to offer a combined package of services that includes resold BOC local exchange service.[31] Thus, sec-

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[30] Section 271(e) states that:

> Until a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.

47 U.S.C. § 271(e)(1). The large interexchange carriers are free, however, to offer a combined package of long distance service and local service provided through use of unbundled network elements.

[31] We note that, without nondiscriminatory access to a BOC's operations support systems, competing carriers, including large interexchange carriers, may be severely disadvantaged, if not precluded altogether, from competing effectively in the local exchange market through the offering of resold local services. *See Local Competition Order*, 11 FCC Rcd at 15764; *see also Application of BellSouth Corporation, Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539, 585, 588, 597 (1997) (*BellSouth South Carolina 271 Order*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20613-14 (1997), *recon. pending* (*Ameritech Michigan 271 Order*).

tion 271(e) provides a substantial market incentive to open the local markets and obtain section 271 approval within three years of enactment.[32]

7. Under this statutory framework, carriers will achieve significant competitive advantages when they can provide customers with combined packages of local and long distant services.[33] These advantages are key to understanding the competitive harm that could result from premature BOC entry into the long distance market. Premature entry would reduce the BOCs' incentives to open their local markets, which was one of the major goals that Congress sought to achieve in the 1996 Act. The obvious result is less local competition. The perhaps less obvious, but equally serious, result is less long distance competition. If BOCs unlawfully offer combined packages of local and long distance services that competing IXCs cannot duplicate, either because they are barred by section 271(e) or because the local markets are not yet open, then the BOCs will have used their control of the local bottleneck to gain an unfair advantage against long distance carriers.[34] The ultimate result will be less competition in both the local and long distance markets.

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32 Although the large IXCs will be free to offer combined packages of telecommunications services after February 8, 1999, the BOCs will still be bound by their obligations in section 271 to demonstrate that their local markets are open to competition before offering such packages.

33 *Ameritech Michigan 271 Order* at 20552 ("[G]iven the BOCs' strong brand recognition and other significant advantages from incumbency, advantages that will particularly redound in the broad-based provision of bundled local and long distance services, we expect that the BOCs will be formidable competitors in the long distance market and, in particular, in the market for bundled local and long distance services.")

34 In contrast, the BOCs are permitted to provide interLATA services originating outside of their states where they currently

B. Ameritech's and U S WEST's Business Arrangements

8. Neither Ameritech nor U S WEST has received section 271 authorization from the Commission.[35] At some point in late 1997 or early 1998, both carriers, recognizing the material benefits of being able to provide combined packages of services to their customers, began considering ways in which they could offer interLATA service to their in-region customers immediately. In its declarations, for example, Ameritech refers to three internal documents that "were created when Ameritech was first exploring the concept of teaming arrangements with long distance

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provide local service. The extremely limited efforts by the BOCs to offer such long distance services strongly suggests the advantages (or perceived advantages) of a carrier's competing in a region where it can provide multiple services and build upon substantial name recognition, such as the BOCs have in their in-region states.

[35] On January 7, 1997, Ameritech became the first BOC to file an application with the Commission for authorization to provide in-region, interLATA service, pursuant to section 271(d). This initial application was terminated without prejudice at the request of Ameritech on February 12, 1997. *See Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Michigan*, Order, CC Docket 97-1, 12 FCC Rcd 2088 (1997). On May 21, 1997, Ameritech Michigan filed its second application to provide in-region interLATA services in the state of Michigan pursuant to section 271. *Ameritech Michigan 271 Order* at 20545. The Commission determined that Ameritech had not demonstrated that its local markets were sufficiently open to competition and denied the application. *Id.* at 20558-59 (concluding that "Ameritech [had] not yet demonstrated that it [had] fully implemented several items of the competitive checklist in section 271(c)(2)(B) or that the requested authorization [would] be carried out in accordance with the requirements of section 272").

U S WEST has not yet filed an application with the Commission seeking section 271 approval to provide in-region, interLATA services.

carriers."[36] U S WEST also apparently considered ways to offer combined service packages that included long distance service by entering into what it termed "teaming" agreements with long distance carriers.[37]

1. Ameritech's CompleteAccess Program

9. During the course of its deliberations, Ameritech determined that being able to provide its in-region customers with a combined offering that included long distance service would generate increased sales of vertical features such as call waiting, caller ID, and automatic redial, as well as promote customer winback and retention programs.[38] Ameritech recognized that it would

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36 Declaration of Scott P. Alcott, in Support of Ameritech Corporations's Brief in Opposition to the Motion of AT&T Corporation and MCI Telecommunications Corporation for Interim Relief in the Form of a Standstill Order (Alcott Interim Relief Declaration) at Exhibit D. One such document is labeled "Project Pathfinder." *Id.* at ¶ 8. *See also id.* at ¶¶ 6-9 (noting that Ameritech explored "teaming" agreements with long distance carriers and discussing some of the early teaming agreement proposals).

37 *See* Deposition of Kathy Stephens, Appendix 9, Tab 39, Record of Proceeding in AT&T Corp. *et al.* v. U S West Communications, Inc., No. C98-634WD (filed May 13, 1998) (U S West District Court Complaint) (Record of Proceeding)., Case No. C98-634 WD at 124.

38 *See, e.g.*, AT&T and MCI Brief in Support of Motion for Interim Relief in the Form of a Standstill Order (AT&T and MCI Brief) at Exhibit 35 (Ameritech, RDA Customer Services Practice, CompleteAccess Overview at 1-2) (stating that the "goal [of marketing the package] is to package the long distance portion of CompleteAccess with local service usage" and that "CompleteAccess packages should be offered as an opportunity to upsell local service usage"). *See also id.* at 8 (reiterating in the ordering procedures that the goal is to package the long distance portion of the service with at least one Ameritech service). Alcott Interim Relief Declaration at Exhibit A, AM 03890 (Jan. 21, 1998) (stating in LD Opportunity Assessment that "[t]he ability to offer LD, even on an agency basis, would significantly enhance our Winback and Retention Programs by allowing us to offer solutions in the largest price

retain customers by satisfying the needs and desires of customers who want the simplicity and convenience of a one-stop service offering and at the same time would enhance its goodwill in the marketplace.[39] Ameritech decided to pursue this strategy by developing a program under which it could design and market a comprehensive package of telecommunications services that would include local and intraLATA services, additional features such as call waiting and caller ID, as well as long distance service. Accordingly, Ameritech sought to find a long distance carrier that would provide the long distance component of the Ameritech program in accordance with the type of business agreement Ameritech envisioned.[40] More specifically, Ameritech sought a carrier that would agree to its terms on, *inter alia*, pricing, billing options, and network and transport requirements.[41] Ameritech

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aggressive segment of business telecom—the segment driving the bulk of defections."). Declaration of Neil M. Briskman in Support of Ameritech Corporation's Brief in Opposition in the Motion of AT&T Corporation and MCI Telecommunications Corporation for Interim Relief in the Form of a Standstill Order (Briskman Interim Relief Declaration) at ¶ 4 (stating that "by marketing its local services together with the long distance services of other carriers, Ameritech hopes to more effectively market, and hence increase its sales of, its *own* local services, especially 'vertical services' such as Call Waiting, Caller ID, and Automatic Redial, which offer a higher profit margin than basic local service").

[39] Ameritech Corporation's Brief in Opposition to the Motion of AT&T Corporation and MCI Telecommunications Corporation for Interim Relief in the Form of a Standstill Order (Ameritech Brief) at 2-3.

[40] Ameritech Brief at Exhibit 13, Ameritech Request for Proposal Number PR-002-98 (discussing terms of the proposal); *see also* Briskman Interim Relief Declaration at ¶ 5 (stating that the "RFP described the type of teaming arrangement then envisioned by Ameritech and the possible terms of a teaming arrangement").

[41] Ameritech Brief at Exhibit 13, Ameritech Request for Proposal at 2.3.3, 2.3.8, 2.3.11; *see also* Transcript of Status Confer-

further recognized that it could obtain a "first mover's advantage" by launching a successful marketing program of this kind.[42] Indeed, Ameritech viewed the "first mover's advantage" as a way to "beat [the] Big-3 IXCs to the mass market with a full service offer before IXCs can leverage their customer relationship to sell local."[43]

10. On February 20, 1998, after developing the proposed terms of the combined offering, Ameritech sent a Request for Proposal (RFP) to 164 long distance carriers, soliciting responses from carriers that would be agreeable to its terms.[44] Two carriers responded to this request: Frontier and Qwest. After negotiations reached a stalemate with Frontier, Ameritech began discussions with Qwest. Within 24 hours, Ameritech and Qwest agreed to enter into a business arrangement in which Qwest agreed to allow Ameritech to market Qwest's inter-LATA service within Ameritech's region in conjunction with a package of Ameritech-supplied services, under many of the same terms that were set forth in Ameritech's RFP.[45] In exchange, Qwest agreed to pay Ameri-

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ence of August 12, 1998 (Phillips Testimony) (Status Conference Transcript) at 66-67 (stating that Ameritech initially proposed rates that Qwest should offer).

42 *See* Alcott Interim Relief Declaration at Exhibit B (Deposition of Scott P. Alcott) at 52-53, 61-64 (discussing Ameritech's desire to obtain a "first mover advantage" and discussing whether Ameritech could obtain a first mover advantage by providing a full service offering before IXCs could use their customer relationships to obtain local customers).

43 *Id.* at Exhibit D, AM 06332 (Mar. 16, 1998).

44 Ameritech Brief at 12.

45 *See, e.g.*, Status Conference Transcript at 66-67. At the Status Conference, counsel for both Ameritech and Qwest indicated that, while the agreement grew out of Qwest's response to the RFP, not all of the terms from the RFP were made part of the final agree-

tech a per-customer fee of $3 for each residential customer it obtained and $100 for each business customer it obtained.[46] The compensation received by Ameritech from Qwest is designed to recover marketing expenses solely, according to those two parties.[47]

11. On May 14, 1998, Ameritech and Qwest announced the resulting business arrangement—the CompleteAccess program—through which Ameritech would

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ment. On the issue of price, however, very little change occurred. According to AT&T, Qwest has stated that Ameritech, in negotiating their agreement, described to it an offer which it would want its long distance partner to make; specifically Ameritech sought an arrangement in which Qwest would charge its Ameritech customers 9 to 10 cents per minute for business customers and 7 and 15 cents per minute, respectively, for off-peak and peak residential service. Status Conference Transcript at 18 (Murphy Testimony). Qwest has further testified that the negotiation period, which lasted only 24 hours, was "fast and furious," stating that "[w]henever someone like Ameritech says they're interested in doing business with you, you move quick." AT&T and MCI Reply Brief in Support of Their Motion for Interim Relief in the Form of a Standstill Order at Exhibit 2, Deposition of Stephen Jacobsen (Jacobsen Deposition) at 308. The actual rates established the long distance services provided under the CompleteAccess program are: 7 cents per minute for off-peak residential service; 15 cents per minute for peak residential service; and 9.5 cents per minute at all times for business service. Ameritech Brief at Exhibit 1, Teaming Agreement at 2.

[46] Answer of Qwest Communications Corp., File No. E-98-41, at 9 (filed June 25, 1998) (Qwest Answer) (stating that Qwest compensates Ameritech on a per customer basis for Ameritech's marketing efforts on behalf of Qwest, and also will purchase billing and collection services from Ameritech on the same basis as other IXCs purchase those services); Ameritech Brief at 27 (specifying amount of compensation).

[47] AT&T Complaint (Ameritech) at Exhibit A, Volume 1, Tab 6, Affidavit of Scott Alcott Affidavit at ¶ 3 (stating that the agreement caps the amount Ameritech can be paid to an amount no greater than its actual marketing costs, and requires Ameritech to perform quarterly audits of such costs and to provide any excess amount to Qwest in the form of a rebate).

market Qwest's interLATA services to Ameritech customers under Ameritech's "CompleteAccess" brand name.[48] Ameritech agreed to market Qwest's interLATA service in conjunction with Ameritech's local and intraLATA toll services and enhanced features such as caller ID and call waiting.[49] Therefore, customers subscribing to the program could obtain all of their telecommunications services from one source, thereby enabling Ameritech to offer "a combined local and long distance package of services" that would be "supported by a single customer service number." [50]

12. Ameritech states that, by responding to customers' needs and desires for a combined package of telecommunications services, it hopes to more effectively market, "and hence increase its sales of its *own* local services, especially 'vertical services' such as Call Waiting, Caller ID, and Automatic redial, which offer a higher profit margin than basic local service." [51] In addition, Ameritech states that it hopes to increase its sales of intraLATA toll services.[52] To obtain the benefits of being a CompleteAccess customer, the customer must purchase at least

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48 *See* AT&T and MCI Brief at Exhibit 1, Press Release, "Ameritech and Qwest Team to Provide Customers a Combined Local, Long Distance Offer" (rel. May 14 1998).

49 Ameritech Corp's Answer and Affirmative Defenses, File No. E-98-41, at 12 (filed June 25, 1998 (Ameritech Answer); *see also* Status Conference Transcript at 101 (Phillips Testimony) (stating that Ameritech is selling vertical services when marketing CompleteAccess).

50 AT&T Complaint (Ameritech), Declaration of John A McMaster at 20 (McMaster Declaration) (quoting Ameritech/Qwest Press Release (May 14, 1998)).

51 Ameritech Brief at 3.

52 *Id.* at 3, 64.

one Ameritech service.[53] Ameritech's sales strategy manual instructs telemarketers to try to sell the entire CompleteAccess package with all of the features first, and if the customer declines, to attempt to sell a package with fewer options.[54]

13. Ameritech is solely responsible for the marketing of the CompleteAccess package, including the interLATA services.[55] The agreement contemplates that the CompleteAccess program will be marketed through both inbound (when customers initiate contact with Ameritech) and outbound (when Ameritech initiates contact with customers) telemarketing[56] using Ameritech's customer base.[57] In marketing the CompleteAccess program, Ameritech specifically recommends Qwest long distance customers and, in some instances, engages in price comparisons of Qwest's service to that of other IXCs.[58] When

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[53] *See, e.g.*, AT&T and MCI Brief at Exhibit 40, AM 07870 (stating that "to take advantage of this [long distance] rate, your local service must be with Ameritech"), Status Conference Transcript at 111-12 (Livingston testimony) (stating that a customer that does not take Ameritech's intraLATA service would still be a CompleteAccess customer, but not with respect to that service).

[54] AT&T and MCI Brief at Exhibit 35, AM 10578. *See also id.* at Exhibit 39, AM 05379.

[55] Ameritech Brief at 21-24 (describing Ameritech's marketing of the CompleteAccess Program). *See also* AT&T and MCI Brief at 2, 49.

[56] Ameritech Brief at 21-24; *see also* AT&T and MCI Reply Brief at Exhibit 3, Transcript of Qwest Press Conference at 2 (May 14, 1998) (stating that the teaming agreement contemplates that the marketing of the CompleteAccess program will be conducted through both inbound and outbound telemarketing); AT&T and MCI Brief at 17.

[57] *See* Transcript of Qwest Press Conference at 2.

[58] *See, e.g.*, Ameritech Brief at 22 (stating that when it is time for the customer to order long distance service, the service repre-

marketing the CompleteAccess program, Ameritech would refer to the long distance component of the program as either CompleteAccess long distance or Qwest long distance.[59]

2. U S WEST's Buyer's Advantage Program

14. During its own internal strategy sessions, U S WEST similarly determined that offering a package of services that includes in-region, interLATA service would afford it a means to "[target] high value customers for retention, winback and competitive response reasons . . .," "[i]mprove U S WEST value proposition in its toll markets by 'packaging' competitive intraLATA calling plans with a compelling long distance offer," and "[p]re-position customers for U S WEST Long Distance by providing the convenience of one-stop shopping."[60] U S WEST stated further in its marketing plans that "[U S WEST's] endeavor with Qwest will initially allow [U S WEST] to become an interLATA carrier for customers . . . ."[61] U S WEST began negotiating with Qwest in early March 1998[62] to include Qwest's interLATA telephone service in a combined package of communications services that U S WEST planned to offer to both existing and new customers within its region. In the course of these discussions, U S WEST proposed the price terms that would

sentative states the following, "[y]ou have many companies to choose from to provide your long distance service. I can read from a list of available carriers, but I'd like to recommend Qwest Communications").

59 AT&T and MCI Brief at Exhibit 40, AM 07851.

60 Record of Proceeding at Tab 39, Appendix 6, Q00393.

61 *Id.* at Tab 39, Appendix 10, Q00520.

62 *Id.* at Tab 39, Appendix 7 (U S WEST-Qwest Teaming Agreement).

be acceptable for the interLATA service component of its package,[63] and U S WEST established customer service requirements that had to be met, the means for monitoring whether such requirements were met, and significant consequences for the failure to meet such requirements.[64] Under the terms of the agreement, an increase in price or a failure to provide adequate customer service would be sufficient cause to terminate the business arrangement.[65]

15. On May 6, 1998, U S WEST introduced "a local and long distance marketing alliance" with Qwest under which U S WEST would market Qwest's interLATA services to U S WEST's customers.[66] Under the business arrangement, termed the "Buyer's Advantage" program, customers would be able to obtain in one packaged offering U S WEST local exchange and intraLATA toll services and Qwest's interLATA services.[67] Similar to the requirements of CompleteAccess, customers must subscribe to at least one U S WEST service to become Buyer's Advantage customers.[68]

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[63] *Id.* at Tab 39, Appendix 12, (Deposition of Michael Murphy at 30).

[64] *Id.* at Tab 39, Appendix 7 (U S WEST-Qwest Teaming Agreement at Exhibit B).

[65] *Id.*

[66] McMaster Declaration at 11; Record of Proceeding (U S WEST) at Tab 20 (U S WEST's Memorandum in Opposition to AT&T's Motion for Temporary Restraining Order, or in the Alternative Preliminary Injunction on an Expedited Basis at 1) (May 26, 1998) (U S WEST TRO Opposition); Complaint, AT&T, MCI, and NEXTLINK Washington v. U S WEST, File No. E-98-42, at 10 (filed June 16, 1998 (AT&T Complaint U S WEST)).

[67] Answer of U S WEST Communications, Inc., File Nos. E-98-42 and E-98-43 at 7 (filed June 26, 1998) (U S WEST Answer).

[68] Status Conference Transcript at 107 (Lake Testimony) (acknowledgement by U S WEST that the only way to be a Buyer's Advantage customer is to take some U S WEST service).

16. On May 11, 1998, U S WEST began a comprehensive marketing campaign of the program in six of its fourteen states,[69] which included running television and newspaper advertisements promoting the program. U S WEST also marketed the package through both inbound and outbound telemarketing.[70] As a result of this comprehensive marketing campaign, the Buyer's Advantage program obtained at least 130,000 long distance subscribers in less than one month.[71]

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69 Record of Proceeding (U S WEST) at Tab 8, 15 (Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order, or, in the Alternative, Preliminary Injunction on an Expedited Basis) (AT&T TRO Memorandum); Transcript of Qwest Press Conference at 2 (stating that by the end of the month (which would have been May) this service will be available in 14 states).

70 Record of Proceeding (U S WEST) at Tab 8 (AT&T TRO Memorandum); Record of Proceeding (U S WEST) at Tab 20 (U S WEST TRO Opposition at 6). U S WEST's marketing scripts provide in relevant part:

> I would be happy to share information with you regarding U S WEST Buyer's Advantage, a new long distance service available to our customers. We are very excited to offer you a single point of contact for your local and long distance service. U S WEST Communications has teamed up with Qwest Communications to provide you and your company long distance service.
>
> * * *
>
> There are no monthly fees, you will only have one bill-your U S WEST Communications local phone bill, there is no monthly minimum, billing is accrued in 6 second increments after the initial 18 seconds of usage and we are currently waiving the carrier change charge of $5.00 per line.
>
> * * *
>
> Thank you for calling U S WEST Communications, your local, long distance and inter-net provider.

Record of Proceeding at Tab 21, Declaration of Julia L. Parsons, Attachment B-1 (last page of attachment).

71 *See* AT&T and MCI Brief at 5 (citing Declaration of John A. McMaster at ¶ 38); *see also* Record of Proceeding at Tab 20 (U S

II. PROCEDURAL BACKGROUND

17. Shortly after Ameritech and U S WEST launched their respective programs, actions against them alleging the same substantive violations of the Act at issue here were filed in two federal district courts. On May 13, 1998, AT&T, MCI, ALTS, McLeodUSA, ICG, and GST filed a complaint against U S West in the United States District Court for the Western District of Washington, seeking "preliminary and final injunctive relief, and [ ] damages, for U S West's violation of sections 251(g) and 271 of the [Act]."[72] On May 14, 1998, AT&T, MCI, ALTS, McLeodUSA, Focal Communications Corporation, KMC Telecom II, Inc., and NEXTLINK Communications, Inc. filed a complaint against Ameritech in the United States District Court for the Northern District of Illinois, also seeking "preliminary and final injunctive relief, and damages, for Ameritech's threatened or actual violation of sections 251(g) and 271."[73] This Commission filed amicus briefs in both proceedings, seeking referrals under the doctrine of primary jurisdiction.[74]

WEST Opposition at 6) (stating that approximately 100,000 customers have signed up for this program).

[72] AT&T Corp. *et al.* v. U S WEST Communications, Inc., No. C98-643 (filed in W.D. Wash. May 13, 1998) (U S WEST District Court Complaint).

[73] AT&T Corp. v. Ameritech Corp., No. 98 C 2993, at 2 (filed May 14, 1998) (Ameritech District Court Complaint).

[74] Memorandum of the Federal Communications Commission as *Amicus Curiae* in Support of Primary Jurisdiction Referral, AT&T v. U S WEST (May 29, 1998); Memorandum of Federal Communications Commission as Amicus Curiae in Support of Primary Jurisdiction Referral, AT&T v. Ameritech (June 5, 1998). The doctrine of primary jurisdiction is typically invoked when the enforcement of a claim, which is cognizable in the courts, requires the resolution of issues that are within the special competence of an administrative body. *See WATS Int'l Corp. v. Group Long Distance (USA),*

18. The Washington district court subsequently referred the questions raised in the complaint before it to the Commission, stating that determinations to be made under sections 251 and 271 of the Act concern issues of communications policy that should be considered by the Commission "in the interests of a uniform and expert administration of a regulatory scheme laid down by the [Act]."[75] The Washington district court also issued a preliminary injunction, stating that "while it is neither possible nor desirable to decide the merits at this stage, the court finds on both claims the plaintiffs have shown serious questions going to the merits and a balance of hardships 'tipping sharply in their favor.'"[76] Additionally, the court noted that the legality of the teaming agreement should be decided before the program takes over a greater share of the market.[77] The Illinois district court also referred the proceeding to the Commission. It declined to grant the plaintiffs' request for preliminary injunctive relief, however, stating that "the FCC has the authority to issue interim injunctive relief" and that it would be inappropriate to comment on the merits of a case referred to the Commission.[78]

19. Following the primary jurisdiction referrals, the Commission, by Public Notice, concluded that expedited

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Inc., 11 FCC Rcd 3720, 3722 n.12 (1997) (citing *Western Union Telephone Co. v. Graphic Scanning Corp.*, 360 F. Supp. 593, 595 (S.D.N.Y. 1973)).

[75] *AT&T Corp v. U S WEST Communications, Inc.*, Order Granting Preliminary Injunction, Referring Legality Issue to FCC, and Staying Proceedings, No. C98-634WD, slip op. at 4 (W.D. Wash. June 4, 1998) (*U S WEST Referral Order*).

[76] *Id.* at 3.

[77] *Id.*

[78] *AT&T Corp. v. Ameritech Corp.*, No. 98 C 2993, slip op. at 10-11 (N.D. Ill. June 10, 1998) (*Ameritech Referral Order*).

resolution of the issues referred would best be achieved "in the context of formal complaint proceedings pursuant to section 208 of the Act." [79] On June 15, 1998, pursuant to that Public Notice, AT&T and other complainants [80] filed a consolidated formal complaint against Ameritech, alleging that the CompleteAccess program violates sections 271 and 251(g).[81] The AT&T complainants also sought an interim standstill order and preliminary injunction to prohibit Ameritech from further marketing, promoting, or subscribing additional customers under its business arrangement with Qwest.[82] The Commission granted the AT&T complainants' motion for interim relief on June 30, 1998, thereby requiring Ameritech to refrain from marketing or obtaining new customers for its CompleteAccess program for a period of 90 days.[83] On June 16, 1998, AT&T and others filed a consolidated formal complaint against U S WEST, alleging that the Buyer's Advantage program also violates sections 271 and 251(g).[84] On June 19, 1998, McLeodUSA and others also filed a consolidated formal complaint against U S

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[79] *Procedures Established for Resolution of Primary Jurisdiction Referrals by the U.S. District Court for the Western District of Washington in AT&T Corp. v. U S WEST Communications, Inc., and by the U.S. District Court for the Northern District of Illinois in AT&T Corp. v. Ameritech Corp.*, DA 98-1109 at 1 (rel. June 11, 1998).

[80] Joining AT&T in its complaint against Ameritech are MCI, ALTS, MGC, Time Warner, and NEXTLINK.

[81] 47 U.S.C. §§ 271, 251(g).

[82] AT&T Complaint (Ameritech) at 17; *see also* AT&T and MCI Brief.

[83] *See AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, FCC 98-141 (rel. June 30, 1998) (*Standstill Order*).

[84] AT&T Complaint (U S WEST). Joining AT&T in its complaint against U S WEST are MCI, ALTS, and NEXTLINK Washington, L.L.C.

WEST, alleging the same violations as in AT&T's complaint against U S WEST.[85]

20. Complainants seek: (1) a ruling that Ameritech and U S WEST have "provided" interLATA services in violation of section 271; (2) a declaratory ruling that Ameritech and U S WEST may not endorse or otherwise market the in-region, interLATA services of Qwest or any other carrier until Ameritech and U S WEST have obtained permission to provide in-region, interLATA services pursuant to section 271 of the Act; (3) a ruling that, by endorsing or otherwise marketing Qwest's interLATA services, Ameritech and U S WEST have discrim-

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[85] McLeodUSA Complaint (U S WEST). Joining McLeodUSA in its complaint against U S WEST are ICG and GST. McLeodUSA also filed a complaint against Ameritech alleging that its business arrangement with Qwest violates sections 271 and 251(g). Resolution of both of McLeodUSA's formal complaints were deferred until further notice on June 23, 1998. Letter from Kurt A. Schroeder, FCC, to Richard M. Rindler, Counsel for McLeodUSA (dated June 23, 1998).

In a related matter, on June 11, 1998, Ameritech and U S WEST each filed a petition for declaratory ruling seeking a Commission determination that its business arrangement with Qwest is lawful. Previously, Sprint Communications Corp. had filed a petition for declaratory ruling that the business arrangement contemplated in Ameritech's RFP was unlawful under sections 271 and 251(g). *Pleading Cycle Established for Comments on Sprint's Petition for Declaratory Ruling Regarding Ameritech RFP Practices*, Public Notice, CC Docket No. 98-62, DA 98-849 (rel. May 5, 1998). The Common Carrier Bureau (Bureau) consolidated Sprint's petition for declaratory ruling with the Ameritech and U S WEST petitions, noting that the issues raised therein are substantially similar. *Change in Ex Parte Treatment of Sprint's Petition for Declaratory Ruling Regarding Ameritech RFP Practices, Common Carrier Bureau Consolidates Ameritech's and U S WEST's Petitions for Declaratory Ruling into Single Proceeding with Sprint's Petition for Declaratory Ruling*, Public Notice, CC Docket No. 98-62, DA 98-1183 (rel. June 18, 1998). Resolution of that proceeding is still pending.

inated among long distance carriers in violation of section 251(g) of the Act; and (4) a declaratory ruling that section 251(g) prohibits Ameritech and U S WEST from endorsing or otherwise marketing interLATA services of Qwest or another carrier.[86] Complainant McLeodUSA asks that the Commission "declare [the Buyer's Advantage] arrangement illegal, order U S WEST to immediately cease and desist from its activities under the [arrangement], and direct that U S WEST not enter into a similar [arrangement] without first meeting the requirements under the 1996 Act." [87]

21. On June 17, 1998, Qwest filed motions "to intervene in support of the defendant" in both of the proceedings filed by the AT&T complainants, and sought additional time beyond that granted to Ameritech and U S WEST to file its answer in each proceeding.[88] On June 18, 1998, the Formal Complaints and Investigations Branch (Branch) granted Qwest's motions, in part, allowing Qwest to file the same pleadings as the defendants, but requiring that such pleadings be filed in accordance with schedules applicable to Ameritech and U S West.[89]

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[86] AT&T Complaint (Ameritech) at 17-18; AT&T Complaint (U S WEST) at 15-17.

[87] McLeodUSA Complaint (U S WEST) at 16.

[88] Qwest Motion for Leave to Intervene in Support of the Defendant in AT&T Complaint, File No. E-98-41 (filed June 17, 1998) (Ameritech); Qwest Motion for Leave to Intervene in Support of the Defendant in AT&T Complaint, File No. E-98-42 (filed June 17, 1998) (U S WEST).

[89] Letter from Diane Griffin Harmon, FCC, to Roy E. Hoffinger, AT&T Corp., Lisa B. Smith, MCI Telecommunications Corp., Richard J. Metzger, ALTS, Kent F. Heyman, MGC Communications Inc., Thomas Jones, Counsel for Time Warner Communications Holdings, Inc., Cathey Massey, Counsel for NEXTLINK, John T. Lenahan, Counsel for Ameritech, William R. Richardson, Jr., Counsel for U S West, Charles H. Kennedy, Counsel for Qwest (dated June 18, 1998). The pleading schedules were set forth in two Public Notices

22. On June 24, 1998, AT&T Corp. *et al.* and McLeodUSA filed a joint motion to consolidate the proceedings against U S WEST. On June 25, 1998, the Branch granted the joint motion, thereby reversing the deferral status accorded to that proceeding,[90] stating that to do so would promote economy by facilitating the Commission in resolving these identical issues in one proceeding.[91] McLeodUSA did not seek to consolidate its formal complaint against Ameritech with the AT&T complainant's formal complaint against Ameritech; that proceeding, File No. 98-44, remains in deferral status.

23. On August 12, 1998, a status conference was held with the parties to the three complaints.[92] At the status conference all parties were provided an opportunity to present their arguments orally and Commission staff directed questions regarding the underlying facts and the parties' legal arguments.[93]

III. DISCUSSION

A. Section 271

1. Scope of the Prohibition on Providing InterLATA Service

24. Statutory Context and History. Section 271(a) states that neither a BOC nor a BOC affiliate "may pro-

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issued by the Common Carrier Bureau. *Pleading Cycle Established for AT&T Corp. et al. v. Ameritech Corporation*, File No. E-98-41, DA 98-1164 (rel. June 16, 1998); *Pleading Cycle Established for AT&T Corp. et al. v. U S WEST Communications, Inc.*, File No. E-98-42, DA 98-1188 (rel. June 18, 1998).

90 *See supra* note 86.

91 *Consolidated Order*, DA 98-1252, File Nos. E-98-42 and E-98-43 (CCB Enforcement Div. June 25, 1998).

92 *See* Status Conference Transcript.

93 *Id.*

vide interLATA services except as provided in [section 271]." [94] Generally, under section 271(b)(1), a BOC or a BOC affiliate "may provide interLATA services originating in any of its in-region States" only "if the Commission approves the application of such company for such state under [section 271(d)(3)]." [95] Neither Ameritech nor U S WEST has been granted such approval.[96] Accordingly, our consideration of whether Ameritech's and U S WEST's respective arrangements with Qwest violate section 271(a) requires that we look to the provision's scope and determine the nature of the activities that Congress intended be prohibited through its restriction that no BOC or BOC affiliate "may *provide* interLATA services except as provided in [section 271]." [97]

25. The parties argue that the restriction contained in section 271 is clear. Not surprisingly, however, they suggest opposite "plain meaning" interpretations. Complainants contend that the term "provide" generally means to "make available," and, consequently, urge us to interpret the restriction broadly to encompass a wide range of activities, including "simply marketing" interLATA services.[98] As support, complainants rely on MFJ precedent, which appears to equate "marketing" with "providing." [99]

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[94] 47 U.S.C. § 271(a).

[95] *Id.* § 271(b)(1).

[96] *See supra* note 35.

[97] 47 U.S.C. § 271(a) (emphasis added).

[98] AT&T and MCI Reply Brief at 30 (citing RANDOM HOUSE UNABRIDGED DICTIONARY 1556 (2d ed. 1993) (defining "provide" to mean, among other things, to "make available" or "arrange for")).

[99] AT&T and MCI Brief at 25-27. In one case cited by the complainants, the Department of Justice argued that, when the court modified the AT&T Consent Decree to permit the BOCs to "'*provide*' CPE . . . the Court may have intended to allow them some limited role in the *design and development* of CPE." *United States v. West-*

They also cite the 1996 Act's legislative history, which uses the term "offer" in place of "provide," as evidence that Congress intended for "provide" to be construed broadly.[100] In addition, the complainants contend that the structure of the Act establishes that, when Congress used the term "provide" in setting forth a restriction, it intended to prohibit a wide range of activities, including marketing.[101]

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ern Electric Co., 675 F. Supp. 655, 665 (D.D.C. 1987) (emphasis added). The court, however, rejected this contention, reasoning that the term " 'provide or 'provision' was to be synonymous with marketing or selling." *Id.* at 666 & n.46. The court observed that such an interpretation was necessary to ensure that the term "provide" as used in section VIII(A) was consistent with the use of that term in the remainder of the MFJ, including section II(D)'s restriction on BOC provision of interexchange services. *Id.* The complainants also cite *United States v. American Telephone and Telegraph Co.*, Civil Action No. 82-0192 (filed Apr. 11, 1985), wherein the court decided, among other things, that a BOC violated section II(D)(2) of the AT&T Consent Decree, which provides that "no [BOC] shall provide telecommunications products," by selling an unaffiliated entity's switching equipment to an unaffiliated long distance service provider. According to the complainants, by enacting section 271, Congress obviously intended to restrict the BOCs from engaging in some of the same functions and activities that had been prohibited under the MFJ, including marketing. As support, the complainants rely on *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), in which the Supreme Court held that it is appropriate to presume that Congress was aware of and incorporated prior judicial interpretations where it "exhibited both a detailed knowledge of the [prior] provisions and their judicial interpretation" and departed from those provisions "regarded as undesirable or inappropriate for incorporation."

100 AT&T and MCI Brief at 28 (citing Joint Explanatory Statement at 147). The Joint Explanatory Statement states that section 271 is intended to prohibit a BOC from "*offering* interLATA service within its region" prior to obtaining authorization from the Commission. Joint Explanatory Statement at 147 (emphasis added).

101 Complainants argue that, throughout the Act, Congress used the term "marketing" when it intended to restrict only marketing

26. Defendants argue, conversely, that the restriction in section 271 must be narrowly construed. Specifically, defendants assert that the plain meaning of the term "provide" is to "furnish," which they contend restricts BOCs only to the extent they actually transmit, or act as a reseller of, interLATA services, prior to receiving requisite 271 approval.[102] According to the defendants, any other activity, particularly their "mere marketing" of interLATA service, is permissible under the Act.[103] Defendants further claim that, as a matter of statutory construction, the term "provide" cannot be read more broadly to include "marketing" because, throughout the Act, these terms are used separately and, they contend, deliberately to address different boundaries of permitted and restricted conduct.[104] They argue that, if Congress intended the terms to have synonymous meaning, there would have been no need to use both terms together in the same statute. Indeed, defendants maintain that, under established principles of statutory construction, we are required to give these terms different meanings.[105] Finally,

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activities and used the term "provide" to prohibit the full range of activities that the term "provide" encompasses, including marketing. AT&T and MCI Reply Brief at 31 (citing 47 U.S.C. §§ 271(e)(1), 272(g), and 271(a)).

[102] The defendants argue that the only carriers that "provide" interLATA services within the meaning of section 271 are those that have a legal or contractual obligation to "furnish" interLATA services upon request. The defendants claim that this obligation extends only to carriers who transmit or resell interLATA services. Ameritech Brief at 42-46; U S WEST Answer at 44-45.

[103] Ameritech Brief at 42-50; U S WEST Answer at 44-45.

[104] Ameritech Brief at 42-44 (citing 47 U.S.C. § 251(c)(2)-(6) ("provide"), 260(a) ("provides"), 271(a) ("provide"), 271(e)(1) ("market"), 272(g)(1)-(3) ("market" and "marketing")); U S WEST Answer at 47-48.

[105] Ameritech Brief at 43 (*citing Transbrasil S.A. Lineas Aereas v. Department of Transportation*, 791 F.2d 202, 205 (D.C. Cir. 1986)); U S WEST Answer

defendants point to two Commission orders in which, they argue, the Commission has distinguished the term "provide" from "marketing." [106]

27. Although we agree that Congress used the term "provide" to identify the scope of the section 271 restriction, we reject the parties' assertions that its meaning is clear and unambiguous. The Act does not define the term "provide," and we find the parties' attempts to use dictionary definitions to support their conclusions unilluminating and incomplete. Rather, the term "provide" can, depending on its context, mean a variety of things.[107] It can support a narrow meaning, such as when used to convey the transmission of service. It can also mean something broader such as "make available." The fact that the term "provide" in the abstract can support any

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[106] Ameritech and U S WEST cite to the *Alarm Monitoring Order* and the *Non-Accounting Safeguards Order*. In the *Alarm Monitoring Order*, the Commission concluded that a marketing arrangement between a BOC and an unaffiliated alarm monitoring service provider, under which a BOC would market the latter's alarm monitoring services, does not necessarily constitute the "provision" of alarm monitoring services by the BOC. *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824 (1997) (*Alarm Monitoring Order*). Ameritech and U S WEST contend that the Commission implicitly recognized in the *Non-Accounting Safeguards Order* that section 271 does not prohibit the BOCs from entering into teaming arrangements with unaffiliated long distance service providers, prior to section 271 authorization, by stating that section 272(g)(2) "is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity" to market interLATA services prior to section 271 authorization. Ameritech Brief at 47; U S WEST Answer at 48-49 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22047).

[107] We independently note that THE AMERICAN HERITAGE COLLEGE DICTIONARY defines provide, among other things, as, alternatively, "to furnish; supply" or "to make available; afford." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1102 (3rd ed. 1993).

number of meanings confirms our view that we must look elsewhere to determine its precise scope under section 271(a).[108] As the D.C. Circuit recently noted, "[t]he literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use." [109]

28. We conclude that, in the context of our interpretation of section 271(a), the term "provide" is ambiguous. Accordingly, using the traditional tools of statutory construction, we look next to the context in which the term is used and any relevant legislative history to determine a reasonable meaning.[110] Contrary to the defendants' contentions, this approach is fully consistent with the Commission's analysis in the *Ameritech Michigan 271 Order* and the *Alarm Monitoring Order*, interpreting, in different contexts, the term "provide" and the phrase "engaged in the provision of." The Commission in both the *Ameritech Michigan 271 Order* and the

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[108] As the D.C. Circuit recently noted, in reversing the Commission's interpretation of the term "alarm monitoring service entity," the sole reliance on a dictionary definition to find plain meaning "reflects no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Alarm Monitoring Communications Committee v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997).

[109] *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). We note that the court in this case used the term "deliver" as synonymous with the term "provide" when, in describing the section 271 restriction, the court stated that, under section 271(a), "a BOC may not *deliver* interLATA services not authorized therein." *Id.* at 1046 (emphasis added).

[110] *See id.* at 1047; *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

Alarm Monitoring Order generally recognized, as we do again here, that the term "provide" is inherently ambiguous and that we must, therefore, consider the statutory context in which the term is used to give it precise meaning.[111] We, therefore, disagree with defendants that the specific interpretations of the term "provide" in these orders are controlling here. Rather, because they involve different statutory contexts, simply importing the definitions the Commission adopted in the *Ameritech Michigan 271 Order* or the *Alarm Monitoring Order* would be contrary to the Commission's approach in those orders to giving meaning to the term "provide."

29. In the *Ameritech Michigan 271 Order*, the Commission interpreted the term "provide" within the context of section 271(d)(3)(A)(i), which requires a BOC to demonstrate that it is "providing" access and interconnection pursuant to the terms of the competitive checklist.[112] In this context, the Commission concluded that a BOC "provides" a checklist item if it "actually furnishes" the item or, where no carrier is using the item, if the BOC makes it available "as both a legal and practical matter."[113] Recognizing that the term "provide" is used in

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111 In the *Ameritech Michigan 271 Order*, the Commission determined that the term "provide" is commonly understood to mean both "furnish" and "make available." *Ameritech Michigan 271 Order*, 12 FCC Rcd at 20601-02.

112 Before the Commission may grant a BOC's application to provide in-region, interLATA services, the Commission must determine, among other things, that the BOC has met the requirements of section 271(c)(1)(a) and, "with respect to access and interconnection *provided* pursuant to [section 271(c)(1)(A)], has fully implemented the competitive checklist in [section 271(c)(2)(B)]." 47 U.S.C. § 271(d)(3)(A)(i).

113 *Ameritech Michigan 271 Order*, 12 FCC Rcd at 20601-02.

section 271(d)(3)(A)(i) to describe an affirmative obligation to provide checklist items, the Commission declined to construe the term broadly and, instead, determined that, in order to satisfy section 271(d)(3)(A), a BOC must demonstrate, among other things, that it has "a concrete and specific legal obligation to furnish" checklist items upon request and that "it is presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality." [114] The Commission concluded that such an interpretation would ensure that a BOC is actually furnishing checklist items in a manner that enables competing carriers to effectively serve local exchange customers, and thereby further Congress' goal of facilitating competition in the local exchange market.[115]

30. In contrast to its use in section 271(d)(3)(A)(i), the term "provide" is used in sections 271(a) and (b) to describe a restriction or limitation on a BOC's ability to enter the in-region, interLATA market. The use of the term "provide" in such different contexts may reasonably require us to interpret the term differently in sec-

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[114] *Id.* Notably, in the *Ameritech Michigan 271 Order*, the BOCs and IXCs each urged the Commission to adopt a meaning of the term "provide" that is the exact opposite of the meaning they urge us to adopt in this proceeding. In the *Ameritech Michigan 271 Order*, for example, the BOCs argued that the term "provide" should be broadly construed so that they could fulfill their obligation to provide checklist items either by actually furnishing the item or by making it available. *Ameritech Michigan 271 Order* 12 FCC Rcd at 20600-01. The IXCs, on the other hand, argued that the term "provide" should be narrowly construed to require BOCs to actually furnish checklist items.

[115] Specifically, the Commission noted that such an interpretation of section 271(d)(3)(A)(i) "further[ed] the Congressional purpose of maximizing the options available to new entrants, without foreclosing BOC long distance entry simply because . . . [the BOC's] competitors choose not to use all of the options." *Id.* at 20602.

tions 271(d)(3)(A)(i) and sections 271(a) and (b). Consistent with the Commission's analysis in the *Ameritech Michigan 271 Order*, for example, we interpret the term "provide" in sections 271(a) and (b) in view of the goals Congress sought to achieve by enacting these provisions. In particular, we find that the term "provide" must encompass activities that, if otherwise permitted, would undermine Congress' method of promoting both local and long distance competition by prohibiting BOCs from full participation in the long distance market until they have open their markets to competition pursuant to section 271's competitive checklist. Such an analysis may reasonably require us to adopt an interpretation of the term "provide" in sections 271(a) and (b) that is more comprehensive than the definition adopted by the Commission in the *Ameritech Michigan 271 Order*. Indeed, as we conclude herein, a BOC need not be legally or contractually responsible for furnishing interLATA services upon request in order to engage in the kind of conduct that sections (a) and (b) seek to prohibit.[116]

31. In the *Alarm Monitoring Order*, the Commission did not expressly define what it meant to be "engag[ed] in the provision of" alarm monitoring services, but, instead, concluded that it would determine, on a case-by-case basis, whether a BOC is engaged in the provision of alarm monitoring services in contravention of section 275.[117] The Commission stated that it would take into account a variety of factors in making this determination, including whether the terms and conditions of a sales agency and marketing arrangement between a BOC and an unaffiliated alarm monitoring service entity are made

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116 *See infra* ¶ 37 for a discussion of the scope of the in-region, interLATA restriction in section 271.

117 *Alarm Monitoring Order*, 12 FCC Rcd at 3841-42.

available to other alarm monitoring companies on a non-discriminatory basis and whether the BOC's compensation under such an arrangement is tied to the unaffiliated firm's performance in offering alarm monitoring services.[118] We conclude in this Order, as did the Commission in the *Alarm Monitoring Order*, that, in determining what it means to "provide" interLATA service, we must consider factors that are particularly relevant in the context of section 271(a). Thus, if we limited our analysis of the scope of the in-region, interLATA restriction to the factors the Commission deemed relevant in the context of section 275, we would not be fulfiilling our obligation to interpret the term "provide" in the particular context it is used.[119]

32. Although we thus reject defendants' attempts to import as controlling here specific definitions or conclusions concerning the meaning of "provide," which were considered by the Commission in different statutory contexts, we agree with defendants that Congress' use of both the terms "market" and "provide" in different provisions of the 1996 Act provides guidance as a matter of statutory construction. Specifically, we are persuaded that this suggests Congress did not intend for the terms to be used synonymously. We find it significant that section 272 (g)(2) states that: "[a] Bell operating company may not *market* or sell interLATA service *provided* by an affiliate

118 *Id.*

119 We note that the approach we adopt herein to determine the scope of the section 271 restriction is consistent with the approach the Commission adopted in the *Alarm Monitoring Order*. Indeed, similar to the result reached in the *Alarm Monitoring Order*, we conclude below that the mere marketing of interLATA services does not necessarily constitute the provision of such services within the meaning of section 271. *See infra* ¶ 50. We reached this conclusion, just as the Commission did in the *Alarm Monitoring Order*, by examining the totality of the circumstances, including the language, history, and purpose of the statute.

required by this section within any of its in-region states until such company is authorized to provide interLATA services in such State under section 271(d)."[120] Since section 272(g)(2) thus expressly prohibits a BOC from *marketing* long distance services prior to obtaining authorization under section 271(d), it is unlikely that Congress implicitly intended sections 271(a) and (b) to achieve the same result. As defendants correctly contend, under such an interpretation, BOCs and their affiliates would already be precluded from marketing interLATA services under sections 271(a) and (b) and, therefore, the restriction on marketing set forth in section 272(g)(2) would be superfluous. Moreover, we find some force to Ameritech's position that, if one became a "provider" by "simply marketing" another carrier's services, then those who merely market and sell interLATA services, such as telemarketers and cellular sales agents, could be considered to be "providing" such services.[121]

33. We do not agree with the defendants further, however, that our finding that the terms are not synonymous means that we must construe them as mutually exclusive, that is, as suggesting wholly different meanings. As discussed above, we believe the term "provide" can support multiple and related meanings. Nor do we accept the defendants' view that section 272(g)(2) means that *only* BOC joint marketing of its own long distance affiliate is restricted until after 271 approval, and that *all other* mar-

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120 47 U.S.C. § 272(g)(2) (emphasis added).

121 Ameritech Brief at 42; *see also* U S WEST Answer at 45; *see also infra* ¶ 50 for a discussion of what we understand constitutes "mere marketing." As addressed more fully below, because we ultimately conclude that the defendants would be doing much more than marketing Qwest's service, this finding does not end our inquiry into the lawfulness of the defendants' respective arrangements with Qwest.

keting arrangements with *non-affiliates* must therefore be permissible under the Act. We furthermore reject the defendants' contention that the Commission suggested as much in the *Non-Accounting Safeguards Order*.[122] Instead, the Commission determined there that section 272(g) does not prohibit the BOCs, prior to section 271 authorization, from entering into teaming arrangements that marketing of an unaffiliated entity's interLATA services. This conclusion was based on the Commission's determination that "section 272(g) only restricts the BOC's ability to market and sell interLATA services 'provided by an *Affiliate* required by [section 272]' " and in view of NYNEX's representation that teaming arrangements in which a BOC and an unaffiliated entity would market their *respective* services *were permitted by the MFJ*.[123] The Commission was not presented with, and did not

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[122] Ameritech Brief at 47; U S WEST Answer at 49.

[123] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22047 (citing NYNEX Reply Comments at 15-16). NYNEX argued in the *Non-Accounting Safeguards Order*, that: "Nothing in the MFJ prohibited . . . and nothing in the Act prohibits, a BOC from entering into a teaming arrangement with an unaffilated interLATA provider to *market their respective services* to the same customers, provided all applicable nondiscrimination requirements are satisfied and provided the BOC's activity under the particular teaming arrangement *does not amount to the provision of interLATA service by the BOC itself*. NYNEX Reply Comments at 15-16 filed in *Non-Accounting Safeguards Order*, CC Docket No. 96-149 (internal citations omitted). As support, NYNEX cited a brief submitted by the Department of Justice in the *Shared Tenant Services* proceeding, in which the Department of Justice stated: "[T]here are a variety of ways, including "teaming' arrangement,' for example, by which [a BOC] may participate in the provision of shared service arrangements by providing *permitted products and services* which comprise elements of such arrangeemnts." *Id.* (citing *Response of the United States to AmeritechEs Motion for Clarification and Waiver of the Decree Regarding the Provision o fShared Telecommunications and Other Services*, June 29, 1984, p. 10 n.8 filed in *United States v. Western Elec.*, 627 F. Supp. 1090 (D.D.C. 1986).

address in that Order, whether an arrangement in which a BOC would market its own local services as well as an *unaffiliated* entity's long distance services was permissible under section 272(g) or any other provision of the Act, including section 271. Thus, neither the language of section 272(g)(2) nor the Commission's decision in the *Non-Accounting Safeguards Order* is dispositive of the issue squarely presented here—whether, and the extent to which, a BOC can enter into arrangements with non-affiliated entities to provide a package of services that includes another carrier's long distance service component, and market that package under the BOC's brand name.

34. On this issue, we agree with the complainants that the relevant legislative history offers some general guidance. The history suggests that the restrictions in section 271 should not be limited to prohibiting only the transmission or resale of interLATA service. Significantly, the Conference Report accompanying the final version of the 1996 Act states that BOCs are required to obtain authorization from the Commission "prior to *offering* interLATA services" in their regions.[124] The term "offer" is also used in numerous floor statements referring to the in-region interLATA restriction found in section 271, although the term "provide" is used in the final text of those sections of the Act.[125] Ameritech contends that Congress' use of the term "offer" in the legislative history is meant only to establish that "a BOC cannot offer to *provide its own services* (or those of its affiliate) before

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[124] Joint Explanatory Statement at 147.

[125] *See, e.g., id.* ("[section 271(b)(2)] permits a BOC to *offer* out-of-region services immediately after the date of enactment") (emphasis added); *see also id.* at 152 (stating that the three year "sunset" period of the separate affiliate requirements under section 271 commences "on the date on which the BOC is authorized to *offer* interLATA services") (emphasis added).

obtaining Commission authorization."[126] We disagree with this construction of the legislative history. We find nothing in the legislative history that suggests that Congress was using the term "offer" in this limited context or that we should recognize that Congress implicitly intended to use this limiting phrase. Rather, we find that Congress' interchangeable use of the terms "provide" and "offer" suggests that Congress understood the prohibition to be broader in scope than mere transmission.

35. Statutory Purpose and Structure. Based on the context of the term "provide," along with the relevant legislative history, we can reasonably conclude that the restriction contained in sections 271(a) and (b) neither prohibits nor permits *all* forms of marketing relationships. Although this information supplies us with some direction in defining the general parameters of the restriction, it is not sufficient on its own. Since neither the context of the statutory provision nor its legislative history is dispositive, we examine the statutory purpose and structure of section 271 to give meaning to the scope of the restriction.

36. As discussed above, section 271 has two underlying objectives.[127] First, section 271 seeks to bring additional completion to the long distance market by offering the BOCs the potential opportunity to participate in that market. Second, by conditioning BOC entry into the in-region, interLATA market on whether the BOCs' local markets are open to competition, section 271 seeks to facilitate entry by new entrants into the BOCs' local

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[126] Ameritech Brief at 45 (emphasis in original).

[127] *See generally* Statutory Framework discussion, *supra*, part I.A.

exchange markets. Together, these objectives further the overall purpose of the Act, which is to make all telecommunications markets competitive by fundamentally changing the incentives for market entry and by eliminating remaining monopoly bottlenecks.

37. Thus, in giving meaning to the scope of the in-region, interLATA restriction, we must consider the dual objectives of section 271, as well as the careful balance struck by Congress in the Act's overall structure and framework. In particular, in order to determine whether a BOC is providing interLATA service within the meaning of section 271, we must assess whether a BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition. In making this determination, we balance several factors, including, but not limited to, whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long distance component in a combined service offering, whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public. In evaluating the BOC's actions, we consider the totality of its involvement, rather than focus on any one particular activity.[128]

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[128] We emphasize that the factors we consider here in assessing whether a BOC's involvement in the long distance market rises to the level of "provision" are not necessarily exhaustive. In particular, we make no determination here regarding the extent to which, after a BOC obtains section 271 authorization, we should consider such

2. Legality of CompleteAccess and Buyer's Advantage Programs

38. We conclude, based on the totality of Ameritech's and U S WEST's involvement in the in-region, interLATA market, that they are providing in-region, interLATA services in violation of section 271. Consistent with our interpretation of the scope of the in-region, interLATA restriction, this conclusion is based on our determination that: (1) the inclusion of Qwest's long distance services in CompleteAccess and Buyer's Advantage enables the defendants to obtain material benefits uniquely associated with the ability of the BOCs to include a long distance component of service, including the ability to become a one-stop shopping entity for local and long distance service, the opportunity to win back customers lost to intraLATA toll competitors, the opportunity to sell additional vertical features, and the opportunity to realize additional intraLATA toll and billing and collection revenue, before demonstrating that their local markets are open to competition; (2) the defendants are holding themselves out as providers of long distance services by marketing and selling, under a single brand name, Qwest's long distance services and their own local services and by performing various customer care functions in connection with the long distance services offered under CompleteAccess and Buyer's Advantage; (3) the defendants are performing various functions and activities under their business arrangements with Qwest that are typically performed by those who resell interLATA services, such as marketing, customer care, and establishing the prices, terms, and other conditions for the long distance services to be pro-

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authorization in evaluating whether a BOC's involvement in a teaming, or other business, arrangement constitutes the "provision" of interLATA service.

vided under their respective programs. We examine each of the foregoing factual circumstances more fully below.

39. In our view, one of the most significant factors in our determination that the defendants are providing in-region, interLATA services in violation of section 271 is that, by including Qwest's long distance services in their CompleteAccess and Buyer's Advantage programs, Ameritech and U S WEST each become a comprehensive "one-stop shopping" source for local and long distance services when the defendants have not adequately opened their local markets and thus have not enabled new entrants to also compete in the combined services market. Although Congress contemplated that the framework it enacted would enable the BOCs to obtain the benefits associated with being a provider of long distance services, such as the ability to offer one-stop shopping, we do not find that Congress intended for the BOCs to obtain these benefits, prior to demonstrating compliance with the market opening provisions in section 271. Indeed, Congress held out the possibility of the BOCs being able to participate in the long distance market as a critically important incentive for the BOCs to cooperate in opening their local markets to competition. By conditioning BOC entry into the in-region, interLATA market on whether the local market is open to competition, Congress sought to ensure that, when the BOCs obtain authorization to provide long distance services, and thereby offer one-stop shopping, new entrants would also have the opportunity to provide a combined package of telecommunications services to consumers. In order to ensure that this carefully balanced incentive structure remains intact, we interpret section 271 as prohibiting the BOCs from obtaining the benefits uniquely associated with being able to participate in the long distance market, prior to demonstrating compliance with section 271.

40. We need not speculate upon the extent to which BOCs would receive benefits uniquely associated with the fact that the package of services they offer their in-region cusomers includes a long distance component, as opposed to other services, prior to section 271 authorization. Indeed, the defendants themselves acknowledge that such benefits take many forms. First, the ability presently to be the sole provider of a package of services that includes a long distance component affords these BOCs, prior to their receiving section 271 approval, an enormous benefit in strengthening their position in the telecommunications marketplace. Indeed, Ameritech expressly recognized that its business arrangement with Qwest would give it what it termed a "first mover's advantage." [129] More specifically, Ameritech reasoned that a combined service offering would enable it to "build an entrenched full services base" before the three major interexchange carriers could "leverage their customer relationship to sell local." [130] Similarly, in announcing the Buyer's Advantage program, U S WEST expressly recognized that its arrangement with Qwest "is about serving the customer and bringing them closer to one-stop shopping, which they are demanding." [131] U S WEST further stated in its marketing plans that "[its] endeavor with Qwest will initially allow [it] to become an interLATA carrier" for its in-region subscribers.[132]

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[129] Alcott Interim Relief Declaration at Exhibit C, AM 00930 (Project Pathfinder Briefing, Weekend Draft).

[130] *See e.g., id.*; *id.* at Exhibit D, AM 06332 (Project Pathfinder Briefing).

[131] Economy, *U S WEST Strikes Marketing Alliance with Qwest in Bold Move Skirting Rules*, WALL ST. J., May 7, 1998, at A2 (Statement of Solomon Trujillo, President of U S WEST Communications Group).

[132] Record of Proceeding (U S WEST) at Tab 39, Appendix 10, Q00520. Moreover, we agree with AT&T that a decision to permit the BOCs to compete here effectively transforms the market "from

41. Second, the defendants' ability to provide a combined offering of local and long distance services, prior to demonstrating that their local markets are open to competition, affords them a significant "jumpstart" when they do obtain 271 authorization. U S WEST acknowledges, for example, that a combined local and long distance offering would afford it a means to "[p]re-position customers for U S WEST Long Distance by providing the convenience of one-stop shopping." [133] Indeed, through their branding of the combined offering, both Ameritech and U S WEST are well poised to substitute the long distance service offered by their section 272 affiliate, when they obtain section 271 approval, into the CompleteAccess or Buyer's Advantage package in the future.

42. Third, the defendants expressly concede that a key benefit associated with being able to provide a combined service offering is the opportunity to strengthen and entrench their relationships with their in-region local customers. Ameritech has stated, for example, that the CompleteAccess program enables it to better satisfy those customers "who want simplicity and convenience" and, at the same time, "enhance its own goodwill in the marketplace." [134] U S WEST described Buyer's Advantage as "a marketing tool and . . . a way of adding value when [it] deal[s] with [its] customers." [135] More precisely,

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one in which long distance carriers compete with each other for the favor of customers into one in which [long distance carriers] compete for the favor of the BOC, to be its chosen ally and to get preferential access to that channel rather than aggressively competing against the BOC." Status Conference Transcript at 13 (Keisler Testimony).

133 Recording of Proceeding (U S WEST) at Tab 39, Appendix 6, Q00392, Q00393.

134 Ameritech Brief at 2-3.

135 Status Conference Transcript at 65-66 (Abernathy Testimony).

U S WEST testified that Buyer's Advantage enables it to "keep [its] customers happy."[136] We recognize that a competitive environment demands that carriers strive to satisfy their customers' needs. Indeed, one of the main benefits of competition is that customers' desires are satisfied more effectively. In our view, however, Congress did not intend to permit the BOCs to enhance their relationships with their local customers by offering a telecommunications package that includes long distance services in a way that violates section 271.

43. Finally, the defendants acknowledge that they will derive material financial benefits from each sale of CompleteAccess and Buyer's Advantage. Ameritech states, for example, that "by responding to customers' needs and desires, [it] hopes to more effectively market, and hence increase its sales of, its *own* local services, especially 'vertical services' such as Call Waiting, Caller ID, and Automatic Redial, which offer a higher profit margin than basic local service."[137] Ameritech further admits that vertical features will "market better in combination with the . . . CompleteAccess offer."[138] U S WEST has stated that Buyer's Advantage will enable it to "[target] high value customers for retention, winback and competitive response reasons . . ." and "[i]mprove U S WEST value proposition in its toll markets by 'packaging' competitive intraLATA calling plans with a compelling long distance offer."[139] Under these particular agreements, the BOCs also realize additional intraLATA toll and billing and col-

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[136] *Id. See also* U S WEST Answer at 5-6.

[137] Ameritech Brief at 3.

[138] Briskman Interim Relief Declaration at Exhibit 16, 146-47 (Deposition of Neil Briskman).

[139] Record of Proceeding (U S WEST) at Tab 39, Appendix 6, Q00392.

lection revenue.[140] U S WEST has testified, for example, that Buyer's Advantage is designed both to "win back" customers who have been lost to intraLATA toll competitors, such as AT&T and MCI, and to prevent further losses to these carriers.[141] Ameritech has similarly testified that its CompleteAccess program will enable it to regain customers who have been lost to intraLATA toll competitors but who are attracted to a one-stop shopping offer.[142] Moreover, the defendants' involvement in establishing the prices Qwest would charge for the long distance services offered under CompleteAccess and Buyer's Advantage was specifically designed to make these packages more profitable to the BOCs. Ameritech has conceded that: "[t]he better the price [for the long distance services offered under CompleteAccess] the more we sell and the more money we make."[143] Thus, these arrangements demonstrate the significance of combined service offerings as a vehicle for the BOCs to maintain their pre-eminence in the intraLATA market and, ultimately, to compete aggressively in the intraLATA toll market.

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[140] We further note that Ameritech has testified that its billing and collection agreement with Qwest differs from its agreements with other IXCs in that: (1) start-up costs are not being directly recouped under the billing and collection agreement but are recouped as part of the marketing co-payment; (2) Ameritech does not require Qwest to meet the minimum use levels that it ordinarily requires; (3) Ameritech sets the initial "bad-debt" at 5% pending true-up, whereas in other agreements, this amount is ordinarily set at 10%; and (4) Qwest's billing and collection agreement with Ameritech last for two years, whereas other such agreements normally last for one year. Briskman Interim Relief Declaration at Exhibit 16, 149-50 (Deposition of Neil Briskman). *See also* Ameritech-Qwest Teaming Agreement at 2.

[141] U S WEST Answer at 44-45.

[142] Briskman Interim Relief Declaration at Exhibit 16, 148 (Deposition of Neil Briskman).

[143] Status Conference Transcript at 68 (Philips Testimony).

44. Thus, the defendants' business arrangements with Qwest enable them to compete prematurely in the in-region, interLATA market through the provision of one-stop shopping, and to advance their position in the telecommunications marketplace, regardless of whether the defendants derive direct customers payments for the transmission of Qwest's long distance services. Indeed, the record indicates that, in the four weeks preceding the issuance of the preliminary injunction against the defendants, U S WEST successfully persuaded approximately 130,000 of its customers to purchase Qwest's long distance services under its Buyer's Advantage program.[144] And, even with limited in-bound marketing calls, Ameritech successfully persuaded more than 10,000 customers to subscribe to Qwest's long distance services offered under its CompleteAccess program.[145] Moreover, by expressly acknowledging the competitive advantage that they would obtain over the major interexchange carriers by offering a one-stop shopping solution to their in-region subscribers, prior to section 271 authorization, the BOCs have effectively conceded that they sought to compete with interexchange carriers for the provision of interLATA services. Congress expressly created in the statutory scheme, however, a framework for ensuring that the BOCs open their local markets before they may compete in the in-region, interLATA market.

45. A second critical factor is that, by offering one-stop shopping for local and long distance services, under a single brand name, the defendants are effectively holding themselves out to customers as providers of long distance services. Most notably, the defendants have taken several

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[144] U S WEST Answer at 2.

[145] AT&T and MCI Brief at 2 (citing Deposition of Scott Alcott, attached as Exhibit at 24).

specific steps to brand CompleteAccess and Buyer's Advantage as their exclusive combined service offerings. Under their contracts with Qwest, for example, the defendants have the exclusive right to market and sell Qwest's long distance services in conjunction with the marketing and sale of their own local services under the CompleteAccess or Buyer's Advantage brand name.[146] In marketing and selling these combined offerings, the defendants expressly identify themselves as one-stop shopping entities. For example, U S WEST's marketing scripts include statements, such as "U S WEST Communications has teamed up with Qwest . . . to *provide* you and your company long distance service," [147] "With U S WEST Buyer's Advantage, Qwest and U S WEST are able to *provide* you with a one stop telecommunications solution," [148] and "Thank you for calling U S WEST Communications, your local, long distance and inter-net *provider*." [149] Ameritech even sends a letter thanking customers for subscribing to CompeteAccess. In this letter, Ameritech explains the benefits of subscribing to CompleteAccess as including "the convenience of one customer service number to call and just one bill to pay for . . . local and long distance services." [150] When customers dial the

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146 Both of the defendants' respective contracts with Qwest provide that, in order to be considered a customer of CompleteAccess or Buyer's Advantage, the customer must purchase Qwest's long distance services and at least one service provided by Ameritech or U S WEST. *See generally* Status Conference Transcript at 104-110.

147 Record of Proceeding (U S WEST) at Tab 21, Appendix 4 (Declaration of Julia Parsons, Attachment B-1) (emphasis added).

148 *Id.* (Declaration of Julia Parsons, Attachment B-3) (emphasis added).

149 *Id.* (Declaration of Julia Parsons, Attachment B-1) (emphasis added).

150 AT&T and MCI Brief (Ameritech) at Exhibit 2 (Letter from Ameritech to CompleteAccess Subscribers).

number referred to in the Ameritech letter, they will be connected to Ameritech, as Ameritech serves as the initial point of contact for customers who have questions or problems with any of the services purchased under CompleteAccess, including the long distance services offered under the package.[151] By holding themselves out to consumers as being able to provide long distance service, under their exclusive brand name, the BOCs are competing in the in-region, interLATA marketplace before they are authorized to enter this market.

46. We are also persuaded by the fact that, in bringing the CompleteAccess and Buyer's advantage one-stop shopping offers to their in-region subscribers, the defendants engaged in various actions that are typically performed by those who resell interLATA services.[152] For example, the defendants had a significant degree of involvement in designing and developing the long distance component of their respective combined service offerings. Most notably, Ameritech and U S WEST selected Qwest as the provider of the long distance component of CompleteAccess and Buyer's Advantage on the basis of criteria Ameritech and U S WEST established.[153] The defendants

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151 Ameritech Brief at 20.

152 *See generally Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order Docket No. 20097, 60 FCC 2d 261, 262 (1976), for a discussion of the kinds of activities that fall within the definition of "resale."

153 Specifically, Ameritech and U S WEST each sought to enter into an arrangement in which they would exclusively market and sell, under the CompleteAccess or Buyer's Advantage brand name, their own local and intraLATA toll services and a long distance company's long distance services. Any carrier wishing to participate in such an arrangement would have to pay Ameritech and U S WEST a marketing fee, permit Ameritech and U S WEST to serve as the initial point of contact for customers subscribing to the

also had a role in establishing the prices at which Qwest would offer long distance services under CompleteAccess and Buyer's Advantage. Although the defendants both state that the rates set forth in their agreements with Qwest were negotiated, facts in the record indicate that Ameritech and U S WEST had structured, prior to entering into negotiations with Qwest, the prices at which long distance services should be offered under CompleteAccess and Buyer's Advantage in order to make these combined service offerings most profitable to the BOCs.[154] Evidence

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defendants' programs, enter into a billing and collection agreement, and comply with certain network service and transport requirements. *See* Ameritech Request for Proposal Number PR-002-98; *see also* Briskman Interim Relief Declaration ¶ 5; *see also* U S WEST Answer at 5-9.

[154] The record indicates, for example, that Ameritech originally began negotiating with Frontier, an interexchange carrier. In so doing, Ameritech expressly told Frontier that it would have to meet certain price points: 15 cents per minute for peak residential service and 7 cents per minute for off-peak residential service. In a letter dated May 4, 1998, apparently to address Frontier's concerns that Ameritech's suggested pricing "may be perceived as 'predatory,'" Ameritech states: "[A]though we have reached our own conclusions on what price points will make this teaming offer successful, the choice of the prices that you are willing to offer is obviously yours." AT&T and MCI Brief at Exhibit 15, AM 00822 (Letter from Diane Primo, Ameritech, to Brian Fitzpatrick, Frontier, dated May 4, 1998). Ameritech went on to state in this same letter, however, that industry research confirmed that its suggested price points were consistent with "other aggressive account acquisition price points." *Id.* When negotiations with Frontier broke down, Ameritech began negotiating with Qwest. In its initial negotiations with Qwest, Ameritech suggested that Qwest offer long distance service under CompleteAccess at the same rates it had proposed to Frontier, *i.e.*, 7 and 15 cents per minute, respectively, for off-peak and peak residential service. In describing its negotiations with U S WEST, Qwest testified that: "[T]hey were looking for a consumer offer in the 10-cent-a-minute range. They were looking for a business offer in the 10- to 12-cent-a-minute range." Record of Proceeding (U S WEST) at Tab 39, Appendix 12 (Deposition of Michael Murphy).

in the record further suggests that Qwest essentially agreed to join the arrangement under the defendants' terms and conditions.[155] In short, the evidence strongly suggests that it is defendants, not Qwest, that established the prices and terms for the long distance services to be provided under CompleteAccess and Buyer's Advantage.

47. We further note that these business arrangements effectively enable the defendants to exercise strong prospective influence over the prices, terms, and conditions of the long distance services provided under CompleteAccess and Buyer's Advantage. For example, Qwest may not increase its prices during the term of its agreement with U S WEST[156] and may increase its prices under its

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155 Similar to the rates initially proposed by Ameritech, for example, the Ameritech-Qwest contract specifies that Qwest initially will charge CompleteAccess subscribers 7 cents per minute for off-peak residential service; 15 cents per minute for peak residential service; and 9.5 cents per minute for business service. Ameritech-Qwest Teaming Agreement § 1.02. We further note that Ameritech concedes that Qwest had proposed prices that were higher than what Ameritech suggested but, as the contract reflects, Qwest will provide long distance services under CompleteAccess at the rates initially proposed by Ameritech. *See* Ameritech Brief at 69-70 (citing Alcott Deposition at 106); Ameritech-Qwest Teaming Agreement § 1.02. Qwest has further testified that its negotiations with Ameritech were "fast and furious," stating that "[w]henever someone like Ameritech says they're interested in doing business with you, you move quick." AT&T and MCI Reply Brief, Jacobsen Deposition at 308. Qwest further states that the negotiation period lasted only twenty-four hours. *Id.* Qwest testified that, in its initial negotiations with U S WEST, U S WEST outlined the general structure of the Buyer's Advantage offer, including the price points they were expecting. Qwest characterized its response to U S WEST's offer as: "Yeah, we think we can do that, and endorsing the notion and expressing an interest in moving ahead quickly, which eventually we did." Record of Proceeding (U S WEST) at Tab 39, Appendix 12 (Deposition of Michael Murphy).

156 U S WEST Answer at 11; U S WEST-Qwest Teaming Agreement § 2.3.

agreement with Ameritech only after giving Ameritech sixty days notice.[157] Notably, if Qwest does, in fact, raise its prices beyond those specified in its agreement with Ameritech, Ameritech may terminate the contract.[158] Both contracts also contain several specific network and service requirements Qwest must meet in order to continue providing long distance service under CompleteAccess and Buyer's Advantage.[159] Ameritech may terminate its contract with Qwest if Qwest deviates from the "minimum network and operations specifications and requirements" set forth in the contract, and such deviation "impacts Ameritech operations or its brand image or values."[160] U S WEST reserves the right to terminate its contract with Qwest if Qwest "[f]ail[s] . . . to meet the service standards set forth [in the contract]."[161]

48. The defendants also perform other functions and activities under their respective business arrangements with Qwest that are typically performed by resellers. For example, the defendants serve as the exclusive marketing and sales agents of CompleteAccess and Buyer's Advantage.[162] The defendants, therefore, seek to induce their in-region subscribers to select the long distance services offered by Qwest under CompleteAccess and Buyer's Ad-

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157 Ameritech-Qwest Teaming Agreement § 1.03.

158 *Id.* Ameritech Brief at 15.

159 Ameritech-Qwest Teaming Agreement, Attach. A (describing the minimum network and service specifications Qwest must meet in order to continue providing long distance service under CompleteAccess); U S WEST-Qwest Teaming Agreement, Ex. B (describing the customer service and service standards with which Qwest must comply in order to continue providing long distance service under Buyer's Advantage).

160 Ameritech-Qwest Teaming Agreement § 1.02.

161 U S WEST Teaming Agreement, Ex. B, § 1(d).

162 Ameritech Brief at 21; U S WEST Answer at 7.

vantage, rather than the services offered by a competing interLATA service provider. If a customer does, in fact, subscribe to CompleteAccess or Buyer's Advantage, he or she will primarily interface with the defendants, as the defendants serve as initial point of contact for customers' billing and collection and service inquiries.[163] Qwest interacts with the customer only after Ameritech or U S WEST has determined that the customer's question or concern relates to a problem in Qwest's long distance service network.[164] In addition, Ameritech requires Qwest to provide status and resolution information about any trouble ticket Ameritech refers to Qwest so that Ameritech can provide feedback to the end-user "as necessary and appropriate." [165] Under the U S WEST-Qwest contract, Qwest is required to provide U S WEST "with the status and disposition of its customer service activities." [166] The only long distance function the defendants do not perform under their respective business arrangements is the actual transmission of calls across LATA boundaries; this function is performed by Qwest.

49. We further note that Ameritech's and U S WEST's business arrangements with Qwest enable them to provide the type of combined service offering that is prohibited to certain interexchange carriers under section 271(e). In section 271(e), Congress prohibited large IXCs from entering the combined services market through the resale of the BOC's local service for three years, or until the BOCs could likewise enter the market through a long distance affiliate after obtaining 271 approval.[167] This provision

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[163] Ameritech Brief at 19-20; U S WEST Answer at 13.

[164] Ameritech Brief at 20 (citing Briskman Testimony ¶ 46); U S WEST Answer at 13.

[165] Ameritech-Qwest Teaming Agreement, Attach. A at 17.

[166] U S WEST-Qwest Teaming Agreement, Ex. B, § 1(d).

[167] 47 U.S.C. § 271(e)(1); *see also supra* note 30.

appears to have several objectives. First, it seeks to diminish the likelihood that the large IXCs would gain a "first mover's advantage" by merely reselling the BOC's local services as part of a combined service offering. Second, it acts to encourage the IXCs to become facilities-based providers of local services because the prohibition does not extend to IXCs that seek to provide a package of services that includes local services provisioned through the use of their own facilities. Third, it encourages the BOCs to act expeditiously to open the local market because the prohibition, unless nullified by a BOC's receipt of section 271 authorization, expires three years from the date of enactment. We cannot reasonably interpret section 271 as prohibiting IXCs, who lack monopoly power, from competing in the combined services market through the resale of the BOC's local services for three years, while permitting a BOC, who has not yet opened its local market to competition, to provide a similarly packaged combined service offering immediately.

50. Based on this factual record, we reject defendants' attempts to label the functions and activities they perform under their business arrangements with Quest as "simply marketing" or "merely marketing." Although it is not clear what the defendants mean when they refer to such terms, we believe that an arrangement in which a BOC would offer the services of its marketing department to market and sell a long distance product or service would be one example of a permissible marketing arrangement. Provided the BOC would make no representation that such product or service is associated with its name or services, such an arrangement would be analogous to billing and collection arrangements and would be permissible under section 271.[168] The business arrangements Ameri-

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168 We recognize, as complainants argue, that the MFJ Court would have found the arrangements before us to be unlawful on the

tech and U S WEST have entered into with Qwest are fundamentally different from this permissible type of marketing, as they involve marketing and selling, under a single brand name, their own local services and Qwest's long distance services. Moreover, the defendants do not just market their own local, and Qwest's long-distance, services, under a single brand name, but they also perform various customer care functions in connection with the long distance services purchased under their respective programs. We further find that the defendants' business arrangements with Qwest are distinguishable from permissible marketing arrangements in view of Ameritech's and U S WEST's role in establishing the prices and other specific terms of the long distance services provided under

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basis that the BOCs were prohibited under the Consent Decree from "marketing" or "selling" a product or service they were prohibited from "providing." 675 F.Supp. at 665-66. For the reasons described above, however, we believe that the 1996 Act contemplates that certain business arrangements between BOCs and non-affiliated long distance entities, that may include some marketing dimension, would be permissible. Accordingly, insofar as the Act supplants the MFJ in the "line-of-business" jurisprudence, *see, e.g.*, 47 U.S.C. § 601, we do not believe these cases are controlling here. As we concluded in the *Ameritech Michigan 271 Order*, however, we find that the principles underlying MFJ case law, which identify the anticompetitive concerns associated with premature BOC entry into long distance prior to local markets being open are nevertheless instructive. *Ameritech Michigan 271 Order*, 12 FCC Rcd at 20553. In this regard, we agree with complainants that the MFJ cases further support our view that certain marketing arrangements can, in effect, permit BOCs to compete in the long distance market, and in so doing, reduce their incentive to bring about free and fair competition in the local market. *See, e.g., Shared Tenant Services*, 627 F. Supp. 1090, 1099 (D.D.C. 1986) (noting that the Consent Decree prohibited the BOCs not only from providing interLATA transmissions but also from "engaging in activities that comprise the business of interexchanges services," the MFJ court reasoned that the restriction was necessary "in order to prevent [the BOCs] from becoming competitors of the interexchange carriers").

CompleteAccess and Buyer's Advantage.[169] Indeed, in view of the nature and extent of the defendants' involvement in their respective one-stop shopping programs and Qwest's limited, secondary role, we find that the defendants have effectively positioned themselves as the sole providers, rather than the mere marketers, of a package of services that includes a long distance component.

51. Finally, we reject Ameritech's contention that "[t]he public interest will be substantially impaired if its [contractual arrangement with Qwest] is enjoined."[170] To the contrary, we conclude that the public interest will be served by our finding that Ameritech's and U S WEST's premature entry into the long distance market is unlawful under section 271 because we are preserving the intent of Congress that local markets be opened to competition before BOCs may enter into the long distance market.[171]

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[169] In this regard, we find persuasive the complainants' line of reasoning to distinguish Ameritech's and U S WEST's agreements with Qwest from marketing:

> AT&T has hired lots of telemarketing firms over the years and signed lots of marketing contracts. None of them has ever tried to tell us what price we should set. None of them has ever said they will terminate marketing for us if we raised our price. None of them has ever said they want to insert themselves as the customer interface after the customer signed up for the service.

Status Conference Transcript at 19 (Keisler Testimony).

[170] Ameritech Brief at 121.

[171] *See, e.g., U S WEST Referral Order.* Upon finding, among other things, that the plaintiffs had raised "serious questions" concerning the legality of the U S WEST-Qwest business arrangement, the court concluded that "U S WEST's argument that [its] teaming arrangements benefits consumers cannot prevail at this state." *Id.* at 3-4. In reaching this conclusion, the court noted that, "if the agreements violates [the Act], it will harm consumers' interests, as identified by Congress, because of its anticompetitive nature." *Id.* at 4.

Moreover, our decision need not impact those customers who wish to subscribe to Qwest's long distance services at the same prices offered to CompleteAccess or Buyer's Advantage subscribers. They can simply subscribe to Qwest's long distance services directly, rather than through Ameritech or U S WEST.

52. In conclusion, based on the evidence presented and applied to our interpretation of the scope of the prohibition under section 271, we find that the defendants' business arrangements with Qwest permit Ameritech and U S WEST to provide in-region, interLATA services, prior to section 271 authorization. It is clear on this record that Ameritech's and U S WEST's business arrangements with Qwest pose the competitive concerns that section 271 seeks to address, and we accordingly find them unlawful under the Act.

B. Section 251(g)

53. The second issue presented by Ameritech's and U S WEST's marketing and recommending of Qwest's long distance service under the CompleteAccess and Buyer's Advantage programs is whether these arrangements comply with the equal access and nondiscrimination requirements under section 251(g).[172] Section 251(g) ex-

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[172] Specifically, section 251(g) of the Communications Act of 1934, as amended, provides, in pertinent part, that:

> each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission until such restrictionss and obligations are explicitly superseded by regulations prescribed by the Commis-

pressly preserves all pre-existing equal access and nondiscrimination requirements that were established "under any court order, consent decree, or regulation, order or policy of the Commission" prior to passage of the 1996 Act until such restrictions are explicitly superseded by the Commission.[173] Section 251(g) further affirmatively grants the Commission authority to prescribe regulations superseding these pre-existing equal access and nondiscrimination obligations.[174] All parties here concede that the Commission has not yet issued any such superseding regulations, and that therefore the MFJ's equal access and nondiscrimination provisions and court orders interpreting those provisions are enforceable "as regulations of the Commission."[175] The parties disagree, however, whether the Com-

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sion after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

47 U.S.C. § 251(g). This statutory language tracks section II(A) and section II(B) of the MFJ. Specifically, section II(A) required that each BOC "provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates." *United States v. AT&T*, 552 F. Supp. at 227. Section II(B) of the Consent Decree further provided that "no BOC shall discriminate between AT&T and its affiliates and their products and services and other persons and their products and services in the . . . interconnection and use of the BOC's telecommunications service and facilities or in the charges for each elemnt of service . . . ." *Id.*

173 47 U.S.C. § 251(g).

174 *Id.*

175 Although the MFJ and related judgments and orders rendered by the MFJ Court were replaced by the 1996 Act generally, the legislative history of section 251(g), like its express language, clearly indicates that Congress intended for the equal access and nondiscrimination requirements under the MFJ and the rules pro-

pleteAccess and Buyer's Advantage programs presently violate the MFJ precedent carried forward under section 251(g). Because we conclude that these programs constitute the unlawful provision of interexchange service in violation of section 271, we need not reach the issue whether they also violate Ameritech's and U S WEST's equal access and nondiscrimination obligations under section 251(g). We believe, rather, that the more prudent course would be to initiate a rulemaking to consider carrier obligations under section 251(g) and determine which obligations the Commission shoud properly retain under the new competitive paradigm contemplated by the 1996 Act.[176] Indeed, through this rulemaking, the Commission

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mulgated by the Commission to remain in effect until superseding regulations are adopted. The Joint Explanatory Statement states that the Senate bill and the House amendments "assumed that the BOCs would continue to be required to provide equal access and nondiscrimination to interexchange carriers . . . ." Joint Explanatory Statement at 122-23.

[176] Contrary to the defendants' assertions, the Commission has not previously described what the full scope of the equal access and nondiscrimination obligations are under the 1996 Act, as carried over from the MFJ by section 251(g). The Commission did not anticipate in the *Non-Accounting Safeguards Order*, as defendants assert, that BOC teaming arrangements with IXCs generally are consistent with the equal access and nondiscrimination requirements. 11 FCC Rcd 21905. Rather, the Commission merely acknowledged that any "teaming" arrangements previously allowed under MFJ precedent continue to be permissible under section 251(g), and did not modify or revise the equal access and nondiscrimination provisions of the MFJ, as carried forward by the 1996 Act. Nor did the Commission address the full scope of the BOCs' equal access and nondiscrimination obligations in the *BellSouth South Carolina 271 Order*. 13 FCC Rcd 539. Instead, the Commission balanced the obligation to read in random order a list of interexchange carriers, which is among the specific rules adopted by the MFJ Court pursuant to the equal access and nondiscrimination obligations, with the express statutory language in section 272(g)(2) permitting a BOC to jointly market its long distance affiliate's services. *Id.*

can consider more broadly the proper scope of the equal access and nondiscrimination requirements in the post-Act environment.

54. So as not to prejudge that future rulemaking, we choose not to decide the present legality of these business arrangements under section 251(g). In considering the record before us, however, we believe the facts raise serious concerns that Ameritech and U S WEST, through the CompleteAccess and Buyer's Advantage programs, may have violated their existing equal access and nondiscrimination obligations. Specifically, MFJ precedent, which would expressly control an analysis under section 251(g) prior to our future rulemaking, would appear to prohibit a BOC's endorsement or promotion of one IXC's services over another IXC's services. The MFJ Court specifically applied the equal access and nondiscrimination requirements to the BOCs' dealings with their customers in a case involving the treatment of undesignated long distance traffic [177] during the period equal access initially was phased in.[178] Indeed, the MFJ Court made clear that the BOCs were permitted to assist customers in locating a long distance carrier, "provided that no favoritism is shown to any particular carrier." [179]

55. The MFJ Court also appeared to articulate broadly a principle of non-favoritism underlying the BOCs' equal

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[177] The term "undesigned traffic" refers to inter-LATA calls made by subscribers who do not designate an interexchange carrier either by presubscription or by use of an access code. *United States v. Western Elec.*, 578 F. Supp. 668, 669.

[178] *United States v. Western Elec.*, 578 F. Supp. 668. In that same case, the court found that the "basic purpose of the decree [was] to place all interexchange carriers on an equal footing." *Id.* at 677.

[179] *Id.*

access and nondiscrimination obligations in the *Endorsement* case.[180] In that case, Southwestern Bell leased a PBX (essentially a switch placed on a business customer's premises) as well as maintenance and support services to National Telecommunications, a reseller of interexchange service. Southwestern Bell provided National Telecommunications with the following "endorsement of quality:"

> National Telecommunications of Austin is a new discount long distance company servicing the Austin free-calling area. With National, every call you make is handled by switching equipment provided and maintained by Southwestern Bell Telecom. Then, your call is transmitted over the Southwestern Bell Telephone Company and AT&T Communications network system. This system is completely compatible with the system National Telecommunications is utilizing.[181]

The court held that, "by granting to National an endorsement of quality, Southwestern Bell has violated the nondiscrimination provision of section II(B) of the decree." [182]

56. In a case examining the propriety of BOC practices relating to calling cards, the court determined that the BOCs could issue calling cards usable for both local and long distance calls, provided that they did not discriminate among the various interexchange carriers with respect to the calling cards.[183] The court found that the

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[180] *United States v. AT&T*, Civ. Action No. 82-0192, slip op., (D.D.C. Apr. 11, 1985) (*Endorsement*).

[181] *Id.* at 2 n 2.

[182] *Id.* at 3.

[183] *United States v. Western Electric*, 698 F. Supp. 348, 353 (D.D.C. 1988) (*BOC Calling Card*).

preferential treatment afforded to AT&T by the BOCs in that instance violated the equal access and nondiscrimination provisions of the MFJ.[184] In reaching its conclusion, the court relied on, among other things, the fact that any advertising or marketing of the calling card by the BOC effectively promoted AT&T's service over that of other interexchange carriers' services.[185] Indeed, the court noted that any advertising by the BOCs of the calling card service when AT&T was the only long distance provider associated with that service would have the "direct foreseeable effect of promoting AT&T services over those of the other interexchange carriers." [186]

57. Taken together, these cases appear to stand for the proposition that BOCs may not favor an interexchange

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[184] *Id.* at 353. The preferential treatment included: (1) assigning to AT&T all of the long distance calls made on BOC calling cards; (2) making calling cards validation information available only to AT&T; (3) marketing and advertising of BOC-issued calling cards in a manner that promoted AT&T's interexchange service over the service of other carriers; and (4) providing an international number on their calling cards that credits calls only to AT&T where other interexchange carriers could not obtain comparable international numbers.

[185] *Id.* at 356. *See, e.g., id.* at 354 (finding that AT&T derived a "considerable competitive advantage from its sole access to the validation databases it shares with the [regional BOCs]"); *id.* at 357 n.50 (finding that "use of an international number which has the effect of crediting calls only to AT&T tends to promote the use of AT&T international carriage and service").

[186] *Id.* at 356. The court further concluded that the BOCs' failure to inform customers that they had a choice among interexchange carriers, combined with the BOCs' practice of automatically routing interexchange services to AT&T—because AT&T was the only carrier capable of handling the traffic at the time—was misleading to customers. *Id.* at 356-57, 357 nn.44-45. The court noted that such advertising may mislead customers into believing that long distance calls made with the BOC calling card would be carried by the BOCs themselves. *Id.* at 356 n.38.

carrier by endorsing or promoting the services of one interexchange carrier over another. Specifically, these decisions factored in, among other things, that BOCs maintain both a ubiquitous brand name awareness and unparalleled access to customers that, without constraints, easily could be used to steer customers' decisions and, as a result, influence competition in the long distance market. Accordingly, to make sure that customers make their long distance choices based solely on the merits of a long distance offering, the MFJ Court determined that the BOCs must facilitate the ability of customers to choose, but remain neutral as a participant in that decision.

58. Applying this MFJ precedent to the record before us raises serious concerns that Ameritech and U S WEST, under the CompleteAccess and Buyer's Advantage programs, are endorsing and promoting Qwest's long distance service over that of other IXCs' services in violation of the existing equal access and nondiscrimination requirements.

59. In particular, the record indicates that Ameritech and U S WEST are actively recommending Qwest's long distance service over other interexchange carriers' service. For example, Ameritech's marketing script specifically states,

> "You have many companies to choose from to provide your long distance service. I can read from a list of available carriers, but I'd like to *recommend* Qwest Communications, and I can provide more details on the Qwest offer, if you wish." [187]

Additionally, Ameritech's training materials instruct its representatives to market CompleteAccess to small business customers who call Ameritech inquiring about, among other things, additional lines and adding or deleting fea-

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[187] Ameritech Brief at 22.

tures to their existing service.[188] Ameritech's marketing scripts state that Qwest's rates "offer [ ] significant savings over MCI, AT&T, and Sprint."[189] Through the Buyer's Advantage program, U S WEST also is actively endorsing and recommending Qwest's long distance service. For example, during outbound telemarketing, U S WEST informed its customers about its "special one stop shopping offer on all your calls whether they are local or long distance."[190]

60. Ameritech's training materials also instruct its representatives to tell its customers that Ameritech invited all the major IXCs to participate in the review process, and that it "selected" Qwest as the long distance provider for the CompleteAccess package because Qwest "satisfied the rigorous requirements [Ameritech] established for quality, value and convenience."[191] Such representations may encourage use of Qwest and may even suggest that other IXCs' services are inferior to Qwest's, while failing to acknowledge that most of the major long distance carriers elected not to participate in the review process.[192] Finally,

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188 Ameritech Brief at Exhibit 22, AM 10579-85.

189 *Id.* at AM 10590-91. Arguably, Ameritech's price comparison of long distance carriers' plans and the suggestion that Ameritech customers would benefit most from the Qwest plan, as opposed to the other IXCs' plans, place Ameritech in the position of endorsing Qwest's long distance service over the IXCs' service.

190 U S WEST Answer at Tab 4B2 at 1, Appendix (outbound marketing script); *see also* U S WEST Answer at 17.

191 Ameritech Brief at Exhibit 22, AM 10591.

192 Based upon Ameritech's endorsement, one might reasonably conclude, although wrongly, that the major carriers participated in the review process, and that, upon thorough evaluation, Ameritech concluded that none of the major carriers met its rigorous requirements for quality, value, and convenience. In fact, Ameritech did not have an opportunity to make such a determination because none

Ameritech's training materials instruct its representatives to state that, by entering into its arrangement with Qwest, Ameritech will be offering its customers long distance service "with the *best* price, performance, and quality available in the marketplace." [193] U S WEST's marketing materials instruct its representatives to encourage its customers to select Qwest over all other long distance carriers.[194]

61. In addition to Ameritech's and U S WEST's active endorsement of Qwest's long distance service, their branding of the respective total package of services as their own program places them in the position of endorsing, at least implicitly, Qwest's long distance service. Indeed, Ameritech acknowledges that CompleteAccess is attractive to small carriers, like Qwest, that "[lack] brand recognition." [195] Presumably, this is so because, although many local customers may not recognize Qwest's brand name, they undoubtedly will recognize Ameritech's; thus, the mere association of Qwest's long distance service with Ameritech's services would suggest to customers that Ameritech endorses Qwest's services over other IXCs'. The same is true with regard to U S WEST's promotion of Qwest's long distance service. These marketing arrangements allow Qwest to have its name and long distance service associated with the BOC's local service brand name, and to enjoy the same unparalleled access to customers as the BOC. Ameritech's and U S WEST's mar-

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of the major carriers actually participated in the review process. Ameritech Brief at 12 (stating that only two IXCs, Qwest and Frontier, responded favorably to Ameritech's RFP regarding participation in the underlying arrangement).

193 Ameritech Brief at Exhibit 23, AM 10771.

194 U S WEST Answer at Tab 4B1 at 2, Appendix (offering script); *see also* U S WEST Answer at 16.

195 Ameritech Brief at Exhibit 16, 66-68.

keting of Qwest's long distance service under their own brand, in conjunction with their own local and intraLATA toll services, at least implicitly demonstrates that Ameritech and U S WEST are endorsing and promoting Qwest's long distance service.

62. We also find it difficult to foresee how Ameritech and U S WEST could recommend the services of multiple IXCs, while also fulfilling the terms of their contractual agreements with Qwest. In fact, Ameritech acknowledges that it has not developed a plan for this situation.[196] Because the CompleteAccess program includes only Ameritech's intraLATA toll offering and requires that Qwest employ Ameritech's billing and collection services, again, we question whether the arrangement is truly available to all interexchange carriers.[197] The practical effect of an arrangement that requires an IXC to package its long distance service with the BOC's intraLATA toll service is that carriers offering both intraLATA toll and interLATA services would be forced to pay Ameritech each time a customer selected the CompleteAccess package, even though the carrier may have lost one of its intraLATA customers to Ameritech in the process.[198] Furthermore, that carrier effectively would be funding its competitor's (the BOC's) intraLATA toll service campaign.[199]

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916 *See* Ameritech Brief at Exhibit 16, 143-45 (acknowledging that Ameritech has not outlined specific procedures to market the interLATA services of multiple carriers). Additionally, when asked how a BOC could market multi-carrier interLATA services, Qwest's CEO stated, "[t]o be perfectly honest with you, Alvin, I don't know how they'll do it." *See* AT&T and MCI Brief at Exhibit 27, 9 (Qwest/U S WEST Press conference).

197 Ameritech-Qwest Teaming Agreement § 1.02.

198 *See* AT&T and MCI Brief at 47.

199 *Id.* We also are concerned that, by requiring that Ameritech and U S WEST to serve as the center for all customer contact for

Finally, although Ameritech and U S WEST claim that they are willing to negotiate different terms with other carriers,[200] we question whether the intraLATA toll component of the CompleteAccess and Buyer's Advantage programs is negotiable because of the material benefit the BOCs obtain from this particular term.

63. For these reasons, we seriously question whether these arrangements would be permissible at present under the equal access and nondiscrimination requirements carried over from the MFJ, embodied in section 251(g). Whether such arrangements should be permitted in the future, however, properly awaits the intended Commission rule-making, as contemplated under section 251(g), on the scope of carriers' equal access and nondiscrimination obligations in the post-Act environment.

IV. CONCLUSION

64. For the reasons discussed above, we find that Ameritech's and U S WEST's offering of Qwest's long distance service as part of a combined package of services under the CompleteAccess and Buyer's Advantage programs is a violation of section 271 of the Communications Act of 1934, as amended.

V. ORDERING CLAUSES

65. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 208, and 271 of the Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 271, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the formal complaints filed by AT&T Corpora-

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their respective programs, the BOCs' arrangements with Qwest may weaken the IXCs' relationship with their existing customer base, while providing the BOC with the opportunity to hold itself out as the source for "one-stop shopping." AT&T and MCI Brief at 50.

[200] Ameritech Brief at 6; U S WEST Answer at 8.

tion, MCI Telecommunications Corporation, Association of Local Telecommunications Services, MGC Communications, Time Warner Communications Holdings, Inc., NEXTLINK Illinois, Inc., and NEXTLINK Ohio, L.L.C. against Ameritech Corporation and Qwest Communications, Defendant-Intervenor, by AT&T Corporation, MCI Telecommunications Corporation, Association of Local Telecommunications Services, and NEXTLINK Washington, L.L.C against U S WEST Communications, Inc. and Qwest Communications Corporation, Defendant-Intervenor, and by McLeodUSA Telecommunications Services, Inc., ICG Communications, Inc., and GST Telecom, Inc. against U S WEST Communications, Inc. ARE GRANTED to the extent described herein and ARE OTHERWISE DENIED.

66. IT IS FURTHER ORDERED that the Motions for Leave to File Comments as *Amicus Curiae* filed by Advanced Communications Group, Inc., the Bell Atlantic telephone companies, BellSouth Corporation and BellSouth Telecommunications, Inc., the Public Utility Commission of Oregon, SBC Communications, Inc., the Public Utility Commission of Texas, the Washington Utilities and Transportation Commission, and Williams Communications, Inc. ARE GRANTED.

67. IT IS FURTHER ORDERED that resolution of the Motion for Confidential Treatment and Entry of Protective Order filed by Qwest Communications Corporation IS DEFERRED pending resolution of the confidentiality of certain information referred to herein that has been designated as confidential by Ameritech Corporation and US WEST Communications, Inc.

68. IT IS FURTHER ORDERED that all other motions filed in these formal complaint proceedings but not specifically ruled upon are DISMISSED AS MOOT.

69. IT IS FURTHER ORDERED that this Memorandum Opinion and Order shall be effective upon adoption and release to the parties to these formal complaint proceedings.

70. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, shall forward a copy of this decision to the United States District Court for the Western District of Washington, and to the United States District Court for the Northern District of Illinois, promptly upon release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

MAGALIE ROMAN SALAS
Secretary

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: Ameritech's and U S WEST's Business Arrangements with Qwest

I firmly believe that consumers whose local telephone service is provided by a Bell company will benefit greatly when that company can offer them an array of services like those at issue here. One-stop shopping, a single point of contact for service problems or billing inquiries, the ability to obtain any service from any supplier, low prices —these are all good things. But the way to get there is by following the law.

Section 271 of the Communications Act specifies the steps the Bell companies must follow before they may provide long distance services. Their primary responsibility is to open their local markets. The sooner they demonstrate that they have done so, the sooner they may bring consumers beneficial packages of local, long distance, and other services.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: AT&T Corp. v. Ameritech Corp. and Qwest Communications Corp.; AT&T Corp. v. U S WEST Communications, Inc., and Qwest Communications Corp.; MeLeod Telecommunications Services, Inc. v. U S WEST Communications, Inc., Memorandum Opinion and Order

I fully agree with the Commission's conclusion that U S WEST and Ameritech have violated section 271 by providing in-region long distance service through their arrangements with Qwest. I support this finding with reluctance and optimism. On the one hand, consumers thus far have benefitted little from the Telecommunications Act of 1996. A decision to deprive them of a popular service, when viewed in isolation, is counter-intuitive. In that sense, I vote to approve this Order with some reluctance. Yet it must be emphasized that our decision today reflects our fidelity to Congress's carefully constructed framework for achieving the larger goal of meaningful local competition.

This proceeding also leaves me with a sense of optimism. The long distance market, in my view, continues to exhibit oligopolistic behavior. I am not convinced that consumers today are receiving the benefits of full competition. That will change when the power of Bell Companies' brand names and marketing capability is lawfully brought to bear on the long distance market. Bell Company entry into the long distance business portends a major shakeup for the current market leaders, and I believe that upheaval will result in new products, lower prices and better service for consumers. I hope that day will come sooner rather than later.

JOINT STATEMENT OF COMMISSIONERS MICHAEL K. POWELL AND HAROLD FURCHTGOTT-ROTH

Re: Memorandum Opinion and Order, In the Matter of AT&T Corporation, et al. v. Ameritech Corp. et al. (File Nos. E-98-41 et al.).

We write separately to express our firm support for the conclusions reached in this *Order* and to highlight some of the concerns we hope will shape the Commission's consideration of future business dealings like the teaming arrangements we deem unlawful today.

By adopting the Telecommunications Act of 1996, Congress sought to unleash the resources, expertise and creative energy, of firms that have been legally or practically barred from certain markets, all in the pursuit of one important goal: bringing the benefits of competition to the American public. Thus, we should expect that firms will continue to vie with each other to bring newer and better product offerings to their own customers and, if they are successful, their competitors' customers. Indeed, it is this urge to compete and innovate that is essential to the proper functioning of a competitive market. And it is this urge to compete and innovate that has led the defendants to develop the teaming arrangements at issue, by which they could have brought the benefits of "one-stop shopping" in telecommunications to their customers and, thus, to themselves.

Yet the Act does not give the Commission a blank slate. In our struggle to implement the pro-competitive, deregulatory framework envisioned by Congress, fundamental decisions have been made for us. One of these decisions is that the Bell Operating Companies (BOCs) may not provide in-region, interLATA telecommunications service until they comply with the requirements of

section 271.[1] Thus, we are duty-bound to ensure that the BOCs' urge to compete and innovate in the long distance market does not lead them to violate the strictures of section 271. Because we believe the instant teaming arrangements do, according to the detailed factual record they have spawned, violate these strictures, it is without hesitation that we join our colleagues in concluding that the arrangements ae barred under section 271.

We also are pleased to support this *Order* for what it does *not* conclude. As our support of this *Order* suggests, we agree that serious questions remain regarding whether or not the instant teaming arrangements violate the BOC defendants' equal access and nondiscrimination obligations under section 251(g). We believe nonetheless that it is both responsible and prudent that we have expressly declined to make conclusions regarding section 251(g). First, it is not necessary to reach the section 251(g) question to resolve fully the dispute before us. As the *Order* makes clear, the section 271 issues are dispositive with respect to the legality of these teaming arrangements.

Second, we believe that by declining to reach the section 251(g) question in the context of this proceeding, we have successfully resisted the temptation to reaffirm unnecessarily a legal and regulatory regime that Congress required us to reconsider in light of the changing marketplace. Telecommunications policy is steeped in the history of the Modified Final Judgment (MFJ). We are all too familiar with the struggles to break up AT&T and to

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[1] As the *Order* correctly indicates, section 271 has two underlying objectives. First, section 271 seeks to bring additional competition to the long distance market by offering BOCs the potential opportunity to participate in that market. Second, by conditioning BOC entry into the in-region interLATA market on whether the BOCs' local exchange markets are open to competition, section 271 also seeks to facilitate entry into those markets. *See generally* 47 U.S.C. § 271.

restrain the pieces of that former monopoly from engaging in anticompetitive behavior. While we may not, in the short-term, be able to walk completely away from that history, neither can we allow ourselves to be haunted by "the ghost of the MFJ." Instead, we must work to exercise that specter. We must strive to leave behind the fears and rituals of the MFJ era and adopt new approaches and modes of thinking that are consistent with a competitive marketplace.[2]

By declining to reach the section 251(g) question in this *Order*, the Commission has avoided unnecessarily prejudging our considertation of the equal access and nondiscrimination obligations contemplated under section 251(g).[3] In light of the relatively tight time frame occasioned by the referral of these matters from the district courts, we believe it would have been difficult for us to think through carefully all the complex issues of interpretation that are associated with applying some of the pre-Act precedent to the facts presented to us in this proceeding. We also believe that we did not have time, in the context of this proceeding, to consider all of the issues concerning what equal access or nondiscrimination obligations should apply to BOCs once they have satisfied section 271. We describe some of these issues below. Our intention in describing these issues is not to criticize the other valid questions raised in the *Order* itself, but rather to share our views regarding the kinds of considerations we should factor into any future consideration of the requirements of section 251(g).

Differences in Factual Context. Because the 1996 Act mandates such a radical change in the framework for reg-

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2 Of course, one can debate the level and permanence of competition in telecommunications today. It is undeniable, however, that competition is and will continue to be more robust and extensive than it was at the time of AT&T's divestiture.

3 *See* 47 U.S.C. § 251(g).

ulating telecommunications, we believe we should be circumspect about how we rely on and extrapolate from MFJ judicial precedent. As the Qwest teaming arrangements dramatically illustrate, the drive to compete and innovate fueled by the Act will feed regulators a constant diet of novel and, in many respects, pro-competitive business arrangements. As such, we will constantly find ourselves, as we do here, with facts that the MFJ court did not consider and perhaps could not have even imagined.

In light of the likely absence of MFJ precedent directly on point, we do not believe we would be constrained to give effect to every sentence of every equal access case if we believe the present facts and circumstances are distinguishable from those of the MFJ era; rather, we believe we should look to the broad context and purposes of the Act to determine which general principles should be imported from that precedent and which should not.

Similarly, we should remain cognizant that the overall factual context in which the pre-Act cases described in section 251(g) were decided is very different from the facts we see now. These differing facts should, in our view, suggest different expectations that we should have regarding the threat of anticompetitive conduct and the precautions we should take to prevent such conduct.[4]

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[4] The idea of considering factual differences in assessing what precautions regulators should take against unlawfully discriminatory conduct was not unknown to the MFJ court. For example, in approving a consent decree for GTE that was lesss burdensome than the MFJ, Judge Green noted expressly that facts that are different from those implicated in the breakup of AT&T could justify different methods of preventing anticompetitive behavior than were used in the AT&T cases. *See United States v. GTE Corp.*, 603 F. Supp. 730, 736 (D.D.C. 1984) ("For these reasons, the Court concludes that the GTE situation is sufficiently different from that which was before the Court when it was presented with a consent decree in AT&T that the public interest does not necessarily require here the remedy that was adopted there."); *see also id.* at 733-37.

Many of the pre-Act cases focused on tearing apart one of the world's largest, most powerful and most integrated monopolies, i.e., separating "Ma Bell" from her babies. In contrast, the arrangements we see today and will see in the future may involve new entrants like Qwest that do not have strong historical ties to the incumbent. The precedent also originates in a world in which the BOCs were essentially walled off from several lines of business—a world that eventually began to erode prior to the 1996 Act [5] and that was eroded in a more fundamental way by the Act itself.

Strength of the Precedent. Related to this unique, factual context of the equal access and nondiscrimination precedent is our concern that the psychology of breaking up deeply entrenched monopolies sometimes led, quite understandably, to sparse analysis and occasionally vague pronouncements by the courts whose duty was to enforce the MFJ. This sparseness and vagueness also may have resulted from the fact that the MFJ court conducted its analysis unconstrained by the intricate web of deregulatory and market-opening requirements woven into the 1996 Act.[6] Simply put, we believe there are reasonably sound arguments that some of the MFJ cases do not provide compelling support for importing propositions that one could glean from these cases to the post-Act context.[7]

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[5] *See, e.g., United States v. Western Electric Co.*, 993 F.2d 1572 (1993) (affirming judgment removing information services line of business restriction from MFJ).

[6] Thus, for example, one could argue that it would be easy for a court to make unconditional statements regarding BOC favoritism when all *marketing* of long distance was considered *provision* of long distance. As the *Order* recognizes, marketing and provision are not synonymous under the Act. *Compare* 47 U.S.C. § 272(g)(2) *with* 47 U.S.C. § 271(a) *and* 47 U.S.C. § 271(b).

[7] *See, e.g., United States v. AT&T*, No. 82-0192, slip op. at 3 (D.D.C. Apr. 11, 1985) (concluding without explanation that "by

Thus, we hope we will consider the strength and weakness of the precedent itself in developing and applying equal access and nondiscrimination requirements pursuant to section 251(g).

Equal Access in a Post-271 World. In reviewing the legality of future business arrangements, we also hope we will be especially careful about how equal access and nondiscrimination requirements apply to companies that the legally authorized to provide long distance service themselves. For example, as the *Order* indicates, BOCs are currently subject to the requirements of both section 271 and section 251(g). Once a BOC satisfies the requirements of section 271, the question would remain whether a BOC's section 251(g) obligations would permit it to team or joint venture with other companies to enable BOC customers to obtain long distance service.

From the perspective of preventing anticompetitive conduct, it seems counter-intuitive that a BOC, having satisfied section 271, *would* be able to provide long distance itself through a section 272 separate subsidiary, but would *not* be able to team with Qwest to offer its customers such service. Presumably, we should be more concerned that a BOC will have the incentive and ability to favor unfairly its own section 272 long distance affiliate as opposed to

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granting to National an endorsement of quality, Southwestern Bell has violated the non-discrimination provision of section 11(B) of the decree"). One also could reasonably argue that the court deciding the *BOC Calling Card* case meant to limit its consideration of the appropriateness of the restrictions it enforced to the time and the facts before it. *See United States v. Western Electric Co., Inc.*, 698 F. Supp. 348, 356 (D.D.C. 1988) ("Any Regional Company advertising *at this juncture* will have the direct foreseeable effect of promoting AT&T services over those of the other interexchange carriers.") (emphasis added).

a non-affiliated long distance company.[8] In addition, it would strike us as odd, given the deregulatory emphasis of the Act, that Congress could have intended to preclude BOCs from being involved in the long distance market in any way other than through a section 272 separate subsidiary.[9] Similarly, section 251(g) should not be used to impose any new or additional barriers on carriers entering new markets.

Relationship to Interconnection Obligations in General. In addition, as the Commission contemplates the requirements under section 251(g), we hope we will think through carefully how such obligations relate to the interconnection requirements we have already imposed under section 251 generally.[10] As the *Order* notes, equal access

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[8] Likewise, it would seem counter-intuitive if equal access obligations designed primarily for BOCs had the collateral effect of prohibiting GTE (which has similar obligations) from teaming with unaffiliated long distance companies: GTE does not have to satisfy section 271 and it has been able to provide long distance in some fashion since before the Act was passed. *United States v. GTE Corp.*, 603 F. Supp. 730, 733 (D.C. Cir. 1984) (approving consent decree permitting GTE to acquire Sprint long distance company). Again, from the perspective of preventing unlawfully discriminatory conduct, we should presumably be more concerned that an incumbent LEC wil have the incentive and ability to favor unfairly its own long distance affiliate as opposed to a non-affiliated long distance company.

[9] We fully recognize, however, that other glosses on Congress' intent are not without support in the statute.

[10] We note that some parties have recognized the potential overlap between interconnection and equal access obligations. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1966*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15677, ¶ 353 (1996) (DOJ and MCI arguing that "superseding regulations" referred to in section 251(g) were the regulations that Commission would issue to implement section 251), *aff'd in part and vacated in part sub nom. Competitive Teelcommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997)

obligations originally were meant to respond to the government's contentions that, in interconnecting their local networks with the networks of the various long distance companies, the BOCs provided inferior interconnection to AT&T's competitors.[11] In the interest of avoiding duplicative requirements, the Commission should think carefully about whether the goals underlying section 251(g) are achieved through the requirements we have already imposed pursuant to the other provisions of section 251. We also should be circumspect about expanding obligations under section 251(g) and should be cautious about imposing equal access and nondiscrimination obligations on BOCs that are different from those imposed on other incumbent LECs.

Procompetitive Benefits. Finally, in developing and applying the requirements contemplated under section 251

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and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Second Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*.

[11] *United States v. Western Electric Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983), *vacated*. Indeed, one could argue that the nondiscriminatory interconnection obligations imposed on all incumbent LECs by section 251(c)(2) were meant to encompass the duty to provide equal access and nondiscriminatory treatment to long distance companies. *See* 47 U.S.C. § 251(c)(2) (requiring incumbent LECs to provide to "any telecommunications carrier" interconnection that is "equal in quailty" to the interconnection LEC provides itself and that is "on rates, terms, and conditions that are . . . nondiscriminatory"). This could mean, for example, that the Commission merely needs to clarify that the interconnection obligations imposed in the *Local Competition Order* were sufficient to satisfy section 251(g).

(g), we should not lose sight of the ultimate goal of equal access and nondiscrimination, which is to bring the benefits of competition to the public. While new business arrangements involving large incumbent LECs like the BOCs potentially raise anticompetitive concerns, these arrangements also promote competition by allowing smaller entrants in long distance or other markets to establish viability in those markets through creative business relationships with established firms. Such relationships, in turn, may benefit consumers in the form of lower prices and stronger incentives on all market participants to match or surpass the new technologies and services used by the entrants. We believe we also should recognize that entrants' incentive and ability to gain such footholds through arrangements with the incumbent may turn, in part, on the degree to which the entrant can differentiate itself in the marketplace.

Thus, in thinking through the extent to which equal access and nondiscriminattion requirements should apply to carriers in the post-Act world, it is our sincere hope that we will be as sensitive to these concerns as we believe the Commission has been in this proceeding. Most of all, we must keep in mind that the equal access and nondiscrimination requirements need to be consistent with the transition from monopoly to a competitive paradigm and should not invalidate or further burden carriers' current activities. It is because of the Commission's wise decision to postpone resolution of these and other issues related to section 251(g) until we can examine them more thoroughly that we are happy to support the *Order* as strongly as we do here.

We commend the Commission staff for its diligent and speedy work on these complex and elusive issues. Moreover, we look forward to working together with everyone

at the Commission as we revisit the issues of equal access and nondiscrimination and as we consider the many novel business arrangements that competiton will no doubt bring us.

APPENDIX C

Filed Aug. 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1468

US WEST COMMUNICATIONS, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

AT&T CORPORATION, *et al.*,
Intervenors

Consolidated with 98-1469, 98-1471

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judges Wald, Henderson and Garland did not participate in this matter.

Filed Aug. 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1468

US WEST COMMUNICATIONS, INC.,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

AT&T CORPORATION, *et al.*,
Intervenors

Consolidated with 98-1469, 98-1471

BEFORE: Silberman, Williams and Tatel, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed July 23, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX D

SECTION 271 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996

[47 U.S.C. § 271]

§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA

services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153 (47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecom-

munications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of section 251 (c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting

carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's

evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5)Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted author-

ity under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) Definition of incidental interLATA services

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services

provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those inter-LATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section—

(1) In-region State

The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms "video programming service" and "other programming services" have the same meaning as such terms have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the inter-LATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

Supreme Court, U.S.
FILED
JAN 24

(2)

No. 99-869

In the Supreme Court of the United States

U S WEST COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission reasonably determined that the commercial arrangement into which petitioner entered with Qwest Communications violated Section 271 of the Communications Act of 1934, 47 U.S.C. 271.

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In the Supreme Court of the United States

No. 99-869

U S WEST COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 177 F.3d 1057. The order of the Federal Communications Commission (Pet. App. 10a-95a) is reported at 13 F.C.C.R. 21,438.

JURISDICTION

The judgment of the court of appeals was issued on June 8, 1999. A petition for rehearing was denied on August 24, 1999 (Pet. App. 96a-98a). The petition for a writ of certiorari was filed on November 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree—which became known as the Modification of Final Judgment, or MFJ—that required it to divest its local exchange operations. The newly independent Bell Operating Companies (BOCs) continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service. The BOCs were initially grouped into several corporate entities known as "Regional Bell Operating Companies." See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 141-142 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

The consent decree, overseen for many years by a federal district court in Washington, D.C., prohibited the BOCs from providing long-distance telephone service, manufacturing telecommunications equipment, and providing information services. In approving the restriction on long-distance service,[1] the district court

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[1] The district court divided the BOCs' collective geographical regions into approximately 160 exchange areas, known as "local access and transport areas" or "LATAs." See *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983). The relevant restriction in the consent decree permitted the BOCs to

explained that a BOC, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities (through which all calls must pass) to impede long-distance competition in two principal ways: The BOC could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. *American Tel. & Tel. Co.*, 552 F. Supp. at 187-188, 223.

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, comprehensively overhauled the regulation of all telephone markets. In the "local competition" provisions of the Act, 47 U.S.C. 251 *et seq.*, Congress sought to open local markets to full competition for the first time by requiring all incumbent local exchange carriers (LECs), including the BOCs, to make their networks and services available to new entrants in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). First, Section 251(c)(2) requires the incumbents to "interconnect" their networks with those of other carriers, and to do so "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Second, Section 251(c)(3) entitles potential competitors to lease elements of an incumbent's network, again at "just, reasonable, and nondiscriminatory" rates, terms, and conditions. Finally, Section 251(c)(4) gives potential

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provide telephone service "only between points within a single LATA, providing what is, basically, the traditional local telephone service." *United States* v. *Western Elec. Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993). For ease of exposition, we refer to inter-LATA calls in the vernacular: as "long-distance calls." Such calls should not be confused with the somewhat larger category of "toll calls," which includes some *intra*-LATA calls that the decree permitted the BOCs to carry.

competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users.

Congress also enacted a set of provisions—applicable to the BOCs and "any successor or assign" (47 U.S.C. 153(4)(B))—that "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing * * * a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 66 (D.C. Cir. 1998), cert. denied, 119 S. Ct. 1495 (1999). The most basic of those provisions is Section 601(a) of the 1996 Act, 110 Stat. 143, which terminates the prospective effect of the AT&T consent decree. In place of the decree, Congress created a transitional regulatory framework governing the BOCs' entry into certain new markets, both to ensure orderly progress towards full competition in telecommunications and to give the BOCs a strong incentive to facilitate the realization of that goal.

Section 271, 47 U.S.C. 271, governs BOC entry into the long-distance market. That provision introduces a procedure under which the BOCs may apply to the FCC for authorization to provide, for the first time, full long-distance telephone service to customers within their "in-region" States. The FCC is to grant a BOC's in-region long-distance application if it finds the following (47 U.S.C. 271(d)): (1) that the BOC has satisfied certain statutory requirements designed to open its local exchange market to competition (47 U.S.C. 271(c)); (2) that, for an interim period, the BOC will conduct its long-distance operations in accordance with the struc-

tural separation requirements of 47 U.S.C. 272;[2] and (3) that granting the application would serve "the public interest, convenience, and necessity" (47 U.S.C. 271(d)(3)). Because no BOC (or BOC affiliate) "may provide interLATA services except as provided in [Section 271]" (47 U.S.C. 271(a)), this statutory scheme gives the BOCs important incentives to open their local markets to competition. See generally Pet. App. 6a-7a; *SBC Communications, Inc.* v. *FCC*, 138 F.3d 410, 413 (D.C. Cir. 1998).[3]

3. Petitioner, a BOC, has not requested authorization under Section 271 to provide interLATA service in any State within its region. In 1998, however, petitioner negotiated an arrangement with Qwest under which petitioner offered a package of local and long distance services with the brand name "U S WEST Buyer's Advantage," and Qwest paid petitioner a fixed fee for each customer that signed up. Pet. App. 2a. Petitioner's involvement in the joint service offering was pervasive. For example, petitioner made the initial contact with potential customers and continued to serve as the primary point of contact for the subscribers to the Buyer's Advantage program; a customer interacted

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[2] Section 272 requires the BOCs to set up separate affiliates if they wish to engage in origination of most non-incidental in-region long-distance services. 47 U.S.C. 272(a) and (b); see also 47 U.S.C. 272(f) (sunset provision).

[3] Several BOCs have submitted applications under Section 271 for authorization to provide in-region long distance service. Although the Commission has denied several such applications, it recently granted Bell Atlantic's application to provide long-distance service in New York. See *Application of Bell Atlantic-New York*, FCC No. 99-404 (Dec. 22, 1999), petitions for review pending *sub nom. AT&T Corp.* v. *FCC*, No. 99-1538 (D.C. Cir.), and consolidated case.

with Qwest only after petitioner had determined that the customer's concern related to an issue with Qwest's long distance network. *Id.* at 67a. And petitioner preserved for itself the exclusive right to market Qwest's long distance service in conjunction with the marketing and selling of its own services. *Id.* at 62a.

Petitioner's internal marketing plans stated that the Buyer's Advantage program "will initially allow [petitioner] to become an interLATA carrier for customers." Pet. App. 32a. Petitioner further stated that the program was designed not only to retain and regain intraLATA toll customers, but also to "[p]re-position customers for U S WEST Long Distance by providing the convenience of one-stop shopping." *Ibid.* In other words, petitioner intended to identify itself in customers' minds as a long distance service provider—and thus to gain a foothold in the long distance market even though it had neither sought nor obtained authorization under Section 271. Indeed, in marketing the Buyer's Advantage program, U S WEST did not always clearly identify Qwest as the long distance service provider. Representations to potential subscribers, for example, stated that "U S WEST Communications has teamed up with Qwest to provide you and your company long distance service." *Id.* at 34a n.70. And petitioner's marketing materials further notified potential customers of "U S WEST's Buyer's Advantage, a new long distance service available to our customers" and thanked customers for calling "U S WEST Communications, your local, long distance and inter-net provider." *Ibid.*[4]

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[4] Ameritech Corporation, another BOC, developed a similar agreement with Qwest. Pet. App. 26a-32a. Following the decision below, Ameritech stipulated in settlement of a lawsuit that its

4. a. Petitioner's Buyer's Advantage program sparked immediate controversy. In May 1998, a group of interexchange carriers and competitive local exchange carriers filed suit in the Western District of Washington, challenging the program's legality. In June 1998, at the FCC's suggestion, the district court referred the case to the FCC under the doctrine of primary jurisdiction. The court also granted a request for preliminary injunctive relief, finding that "the plaintiffs have shown serious questions going to the merits and a balance of hardships tipping sharply in their favor." *AT&T Corp.* v. *U S WEST Communications, Inc.*, No. C98-634WD (W.D. Wash. June 4, 1998), slip op. 3.

b. In October 1998, the Commission unanimously found that petitioner's arrangement with Qwest violated Section 271(a), which, as noted, forbids any BOC to "provide interLATA services" except as provided elsewhere in Section 271. The Commission observed that both sides had argued that the term "provide" (which the Act does not define) is clear, but that each had offered an opposite meaning. Pet. App. 41a. Petitioner argued that Section 271(a) should be read narrowly to encompass only the actual transmission of service. *Id.* at 43a. In contrast, the interexchange carriers and competing local exchange carriers argued that the term "provide" generally means "make

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arrangement with Qwest *was* a violation of Section 271; both Ameritech and Qwest agreed to comply with the Commission's decision, and they waived any rights to seek review of that decision. *AT&T* v. *Ameritech*, Stipulation of Disposition and Permanent Injunctive Relief, No. 98 C 2993 (N.D. Ill. Oct. 22, 1999).

available." *Id.* at 41a.[5] The Commission found the term ambiguous, *id.* at 45a, and concluded that the statutory structure and the legislative history supported a reading substantially broader than petitioner's. See *id.* at 45a-54a.

As the Commission observed, Section 271(a) was intended to promote "local and long distance competition by prohibiting BOCs from full participation in the long distance market until they have open[ed] their [local] markets." Pet. App. 48a. The Commission thus found that the term "provide," as it appears in Section 271(a), denotes a level of participation in the provision of long distance service that would "undermine Congress' method of promoting both local and long distance competition." *Ibid.* The Commission noted that the 1996 Act neither expressly allows nor prohibits all forms of marketing relationships. *Id.* at 53a. But the Commission concluded that *this* marketing arrangement did violate Section 271, because it enabled petitioner "to obtain material benefits uniquely associated with the ability of the BOCs to include a long distance component of service." *Id.* at 55a. For example, the arrangement allowed petitioner, in violation of congressional intent, to become a one-stop shopping source before it had adequately opened its market to competition—and thus before other providers could compete in the combined services market. *Id.* at 55a-56a.

The Commission also found that petitioner was holding itself out as a provider of long distance service. Pet. App. 55a. The Commission based this conclusion in

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[5] The Commission noted that each of the two sides had taken the opposite position when the meaning of the term had arisen in another context. See Pet. App. 47a n.114.

part on the fact that petitioner was selling local and long distance services under its brand name and was performing customer care functions in conjunction with the long distance portion of the "U S WEST Buyer's Advantage" package. *Ibid.* Moreover, petitioner was performing functions that are typically performed by parties that resell interLATA services, including customer care and establishing prices and terms of service. *Ibid.*

c. The court of appeals denied the petition for review. Pet. App. 1a-9a. The court held that "[t]he statutory term 'provide' appears to us somewhat ambiguous in the present context," *id.* at 2a, and that the Commission's interpretation of it here was "clearly reasonable," *id.* at 6a. The court observed:

> [T]he FCC found that the arrangements here would have afforded the BOCs in question a serious advantage, namely, a "first mover's advantage" over any non-BOC firms hoping to secure a position in the anticipated full-service market. By offering one-stop shopping for local and long distance under their own brand name and with their own customer care, [petitioner] and Ameritech could build up goodwill as full-service providers, positioning themselves in these markets before § 271 allows them actually to enter. There appears to have been specific congressional concern over the impact of jointly marketed local and long distance service. * * * If the BOCs could secure this advantage without opening their local service markets, the blunting of the intended incentive would be considerable—or so the Commission could reasonably find.

Id. at 7a (citations omitted). The court further endorsed the Commission's decision to proceed on a case-

by-case basis in determining whether a BOC's involvement in interLATA service violates Section 271(a). *Id.* at 9a.

ARGUMENT

1. The court of appeals correctly determined that Congress has not "directly spoken to the precise question at issue" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984))—and that, under *Chevron*, the Commission's application of Section 271(a) in this case must be upheld if it is reasonable. Petitioner's claim, reduced to its essentials, is that Congress *has* spoken directly to the precise question at issue, because the term "provide," as used in Section 271(a), can only mean "transmit" (Pet. 19) and cannot possibly denote offering long-distance service to the public through the sort of joint service arrangement at issue here. That claim is without merit, and this case warrants no further review.[6]

The Commission found that petitioner's special relationship with Qwest was unlawful not because the BOCs are always barred from any "involvement" in the long-distance market (cf. Pet. 2), but because this parti-

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[6] This case is unworthy of certiorari for a separate, threshold reason as well. Because petitioner and Qwest seek to merge, they could not currently enter into the kind of arrangement at issue here even if they were to prevail on the question presented. See Pet. 8-9 n.7; see also Pet. 28 (conceding that Section 271 prohibits "a teaming agreement that pays a BOC a percentage of an 'unaffiliated' carrier's long distance revenue"). That fact would make this case an exceptionally odd vehicle for reviewing any issue, even though petitioner suggests (Pet. 8-9 n.7) that Article III jurisdiction technically remains because, in a separate proceeding, it has been sued for damages for engaging in the activities in question here. See generally *Taggart* v. *Weinacker's Inc.*, 397 U.S. 223, 224-225 (1970).

cular relationship would have "undermine[d] Congress' method of promoting both local and long distance competition." Pet. App. 48a. The Commission observed that, under that arrangement, petitioner sought to "obtain material benefits uniquely associated with the ability of the BOCs to include a long distance component of service," such as one-stop shopping, "before demonstrating that [its] local markets are open to competition"; that it held itself out as a provider of long distance services "by marketing and selling, under a single brand name, Qwest's long distance services and [its] own local services and by performing various customer care functions in connection with long distance services"; and that it performed "various functions and activities under [its] business arrangements with Qwest that are typically performed by those who resell interLATA services, such as marketing, customer care, and establishing the prices, terms and other conditions for the long distance services to be provided." *Id.* at 55a.

Given those findings, the Commission concluded that petitioner had unlawfully "provided" long-distance services to end users in violation of Section 271(a). That determination was "clearly reasonable," as the court of appeals observed (Pet. App. 6a), and was properly tied to the specific facts of this case (*id.* at 8a-9a). Despite petitioner's unsupported assertion to the contrary (Pet. 19), it is entirely natural to speak of the closely knit commercial arrangement at issue here as enabling petitioner to "provide" long-distance service to its customers; in fact, petitioner's contrary reading, which would exclude that natural meaning, is quite strained. Moreover, as the court of appeals indicated, petitioner's approach is difficult, if not impossible, to square with the statutory scheme, because it would

threaten the "specific congressional concern over the impact of jointly marketed local and long distance service." Pet. App. 7a. Finally, despite petitioner's repeated assertions to the contrary (*e.g.*, Pet. 22), the Commission reasonably concluded that Congress enacted Section 271 in part to give the BOCs an important incentive to open their local markets to competition. See Pet. App. 6a-7a; see generally *SBC Communications, Inc.* v. *FCC*, 138 F.3d 410, 412-413 (D.C. Cir. 1998).[7]

2. Petitioner also seeks to ratchet its statutory construction argument up a level of significance, claiming that this case somehow implicates the nondelegation doctrine. As an initial matter, that claim is not properly before this Court, because petitioner did not raise it in the court of appeals (at least until its petition for rehearing), and that court therefore did not address it.

In any event, the claim is implausible. As this Court has recognized in *Chevron* and its progeny, Congress commonly leaves gaps for agencies to fill; such gaps often take the form of ambiguous statutory language, and this Court has routinely endorsed an agency's resolution of such ambiguities as an important and legitimate exercise of its delegated authority. Although petitioner criticizes the FCC for noting the many ambiguities in the 1996 Act (Pet. 13 n.17), this Court has itself characterized that Act as "a model of ambiguity or indeed even self-contradiction." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). The Court did

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[7] Petitioners renew their arguments based on inferences from "parallel provisions of the Act." Pet. 19. Those arguments are unsound for the reasons identified by the court of appeals. See Pet. App. 3a-8a.

not suggest, however, that such ambiguities raise any issue under the nondelegation doctrine; indeed, it reaffirmed that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Ibid.*

Petitioner nonetheless asserts that Section 271(a) is not ambiguous at all, that the court of appeals agreed that the Commission had "manufactured" an ambiguity (Pet. 14), and that the court nonetheless "felt bound" to "acquiesce" (Pet. 3) in a lawless agency usurpation of congressional authority. That is incorrect. The court of appeals in fact agreed with the Commission that the applicable statutory language is "somewhat ambiguous" (Pet. App. 2a), affirmed the Commission's interpretation of Section 271(a) as "clearly reasonable" (*id.* at 6a), and squarely rejected petitioner's claim that the text of the 1996 Act compels a contrary result (*id.* at 6a-7a).[8] The D.C. Circuit is quite capable of rejecting an agency's statutory interpretation on the ground that "Congress has directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842). Here, however, the court straightforwardly found that Congress had *not* directly spoken to the issue. Finally, there is no merit to petitoner's suggestion (Pet. 27-29) that Congress left the Commission without any "intelligible principle" (*Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)) to apply in resolving that issue. As the court of

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[8] Petitioner repeatedly contends that the court of appeals "was 'puzzled' by the FCC's statutory interpretation" and that it found that the Commission's construction "could be 'nonsensical' in certain circumstances." Pet. 3; see also Pet. 12, 25. That is a substantial mischaracterization of the court's opinion. Although the court questioned a minor "detour" in the Commission's analysis (Pet. App. 9a), it could not have been clearer in endorsing the reasonableness of the Commission's decision as a whole.

appeals observed (Pet. App. 6a-7a), the Commission's order closely tracked the statutory objectives of the 1996 Act.[9]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2000

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[9] Petitioner lays curious emphasis (see Pet. 3, 26-27) on the D.C. Circuit's recent application of the nondelegation doctrine in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999), modified in part, 195 F.3d 4 (D.C. Cir. 1999). That decision not only was issued by the same court as the decision below, but was also written by the same judge, and indeed the panels hearing the cases shared two out of three judges; moreover, the principal opinion in *American Trucking* was issued only several weeks before the decision below. The court's failure to perceive any comment-worthy relationship between the two cases was not the result of oversight.

Supreme Court, U.S.
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(3)

No. 99-869

IN THE
Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the Federal Communications Commission ("FCC") reasonably concluded that U S WEST violated the statutory provision prohibiting it from "provid[ing]" long-distance service, 47 U.S.C. § 271(a), when U S WEST entered into an arrangement in which, among other things, it packaged a long-distance service under its brand name, set the price and other terms of that service, marketed and recommended that service to its customers, advised the customers that subscribed to that service that it had thereby become their "long distance . . . provider," profited from that service, and served as the single point of contact for the initial and all subsequent customer communications.

STATEMENT REQUIRED BY RULE 29.6

AT&T Corp. ("AT&T") is a telecommunications carrier. AT&T has no parent company. No publicly held company owns 10% or more of AT&T's stock.

MCI WORLDCOM, INC. is a Georgia corporation which, along with wholly owned subsidiaries, provides local and long distance telecommunications services domestically and internationally. MCI WorldCom is a publicly traded company on the NASDAQ National Market under the symbol "WCOM." MCI WorldCom has no parent corporations. No publicly held company owns 10 percent or more of MCI WorldCom stock. MCI WorldCom owns a controlling interest in Embratel Participacoes S.A., which issues shares to the public.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 99-869

U S WEST COMMUNICATIONS, INC.,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AT&T CORP. and MCI WORLDCOM, INC. IN OPPOSITION

STATEMENT OF THE CASE

This case concerns an attempt by two Bell Operating Companies ("BOCs") to provide long distance service (also known as "interLATA" service or "interexchange" service) in violation of Section 271(a) of the Communications Act. Section 271(a) states that no BOC may "provide interLATA services" except upon compliance with certain preconditions that, all parties agree, these BOCs have not yet met. 47 U.S.C. § 271(a). Those preconditions require the FCC to find, *inter alia*, that the BOCs have opened their monopoly markets for local telephone service to competition. In addition to providing an incentive for the BOCs to comply with the market-opening

requirements of the Act, Section 271 protects long-distance competition by prohibiting the BOCs from offering customers a combined package of local and long distance services until long-distance carriers can likewise offer such packages in competition with them.

Petitioner U S WEST and another BOC, Ameritech Corp., entered into arrangements with Qwest Communications Corporation ("Qwest"), a long distance carrier, in which they offered packages of long-distance and local service that no other carrier could match. In particular, U S WEST packaged Qwest's long-distance service under its own brand name, set the price and other terms of that service, marketed and recommended that service to its customers, advised its customers that U S WEST would then become their "long distance . . . provider," profited from that service, and served as the single point of contact for the initial and all subsequent customer communications. Pet. App. 23a-34a & n.70. U S WEST nonetheless contended that it could not be held to be "providing" long distance service under § 271(a) as long as Qwest continued to engage in the actual long-distance transmission. The FCC rejected that contention, and the court of appeals upheld its decision as "clearly reasonable." *Id.* at 6a.

The decision below presents no conflict with any decision of any other court, and no issue beyond the correctness of the D.C. Circuit's review of the FCC's application of § 271(a) to the specific facts of this case. U S WEST nonetheless seeks further review of this intensely factbound case on the ground that it is allegedly symptomatic of a broader phenomenon in which courts of appeals "manipulate" this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), so as to accord excessive deference to administrative agencies. U S WEST even claims that this putative phenomenon is leading to widespread

violations of the nondelegation doctrine. Its nondelegation claim, however -- which it did not raise below until its petition for rehearing -- is simply a claim that the FCC assumed "lawmaking powers" by applying a statute differently than U S WEST believes Congress intended, and is thus simply a more grandiose version of U S WEST's uncertworthy claim that the agency in this case has misapplied a statute to a particular set of facts before it.

Most fundamentally, even if the asserted phenomenon of excessive deference by courts of appeals generally actually existed -- and U S WEST makes no showing that it does -- this case would be an exceptionally poor vehicle for addressing it. Even if there were no *Chevron* doctrine and no deference, the FCC's application of the statute here would have to be affirmed as clearly correct.

1. U S WEST and Ameritech, like the other BOCs, have monopolies over local telephone facilities and services in their respective regions. If the BOCs could provide long-distance services while these local telephone monopolies are intact, they could monopolize the long-distance business of the large number of customers who want to engage in "one-stop shopping" and obtain local and long distance service from a single source.

The BOCs' ability to do so is enhanced by their monopoly over the "customer care" channels. Customers in a BOC's service area need to call the BOC whenever they wish to order local service, obtain a new line, add a calling feature such as call waiting, or arrange for repair of their service. This is also the means through which most customers today order long distance service. If BOCs could use this channel to promote a particular long-distance service, they could artificially shift vast arrays of long distance business. These points are

vividly confirmed by the facts of this case. In the brief four-week period before its activities here were enjoined, U S WEST signed up over 130,000 customers for its package of local and long distance service (Pet. App. 34a), even though Qwest's long distance service had not enjoyed even remotely comparable success when it was previously offered directly by Qwest.

For these and other reasons, the consent decree under which the former Bell System was broken up (also known as the Modification of Final Judgment or "MFJ") prohibited BOCs from "providing" long-distance services until such time as they "los[t] the ability to leverage" a local monopoly into the long-distance market. *United States* v. *AT&T*, 552 F. Supp. 131, 194-95 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). While the MFJ was in effect, the BOCs repeatedly made the same claims about the meaning of the prohibition against "providing" long-distance services that U S WEST advances in its petition. The courts rejected these claims. Applying a *de novo* construction of the terms of the MFJ, they held that the long-distance services restriction barred the BOCs from engaging in any aspect of the provision of long distance services, not merely the transmission of long-distance calls. See, *e.g.*, *United States* v. *Western Elec. Co.*, 675 F. Supp. 655, 665-66 (D.D.C. 1987) (construing the term "provide" as "synonymous with marketing or selling"), *aff'd*, 894 F.2d 1387 (D.C. Cir. 1989); *United States* v. *Western Elec. Co.*, 627 F. Supp. 1090 (D.D.C. 1986) (prohibiting arrangement under which a BOC would market and manage a package of telecommunications services, including long-distance service transmitted by another carrier).

2. In 1996, Congress enacted a new subchapter of the Communications Act that is designed to foster competition in the provision of local telephone service. 47 U.S.C. §§ 251-61. Those provisions require the BOCs and other monopoly local exchange carriers to open their markets to competition by,

among other things, permitting competing carriers to obtain access to their network facilities and to use those facilities at the same cost and other terms that the BOC enjoys to provide competing services. See *AT&T Corp.* v. *Iowa Util. Bd.*, 119 S. Ct. 721, 726 (1999).

Although it superseded the MFJ, the 1996 Act, too, seeks to prevent BOCs from using their local monopolies to harm long distance competition. In particular, although § 601(a) prospectively terminated the MFJ, it provides that BOCs are prospectively subject to "restrictions and obligations" of the Communications Act[1] which, under other provisions of the 1996 Act, codify the core of the MFJ's long-distance restriction.

Specifically, § 271(a) states that a BOC may not "provide interLATA services except as provided in this section." See 47 U.S.C. § 271(a). In turn, § 271 provides for only three sets of narrow exceptions, none of which is at issue here. See 47 U.S.C. § 271(b)(2),(3), 271(g), 271(f). Section 271 also sets forth the standards and procedures that will govern any request to remove the remainder of the long distance restriction. It conditions any grant of long-distance authority on the BOC making a showing to the FCC that it has satisfied statutory requirements for opening its local markets to competition. See 47 U.S.C. § 271(c)(2)(B), 271(d)(3).

3. U S WEST has never obtained Section 271 authority from the FCC. On May 6, 1998, however, U S WEST declared that it had found the market-opening requirements of the Act "'cumbersome,'" and announced it would immediately

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[1] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 56, 143.

implement an alliance with Qwest.[2] (U S WEST and Qwest have since announced that they will merge. Pet. 8 n.7.) Ameritech, which likewise had never received section 271 authority, made the same announcement several weeks later. Under these "alliances," these BOCs offered customers a service package that consisted of local and other services (transmitted by the BOC) and long-distance services (transmitted by Qwest). The BOCs used their brand names -- "U S WEST Buyer's Advantage" and "Ameritech CompleteAccess" -- to describe and market the entire package of services. Pet App. 9a, 13a. They engaged in a range of promotional activities, including inbound telemarketing (in which customers who called the BOCs to order local service or for other reasons were urged to purchase the package), outbound telemarketing (in which the BOCs called customers), and television and print advertising. U S WEST's marketing representatives concluded those calls by telling its customers: "Thank you for calling U S WEST Communications, your local, long distance and inter-net *provider*." *Id.* at 34a n.70 (emphasis added).

The competitive strategy behind these alliances was self-evident, and was confirmed by the BOCs' internal planning documents. In particular, each BOC perceived great advantages in being the only carrier in its region able to provide one-stop shopping. Ameritech hoped to "'beat [the] Big-3 IXCs [*i.e.*, "interexchange carriers"] to the mass market with a full service offer before IXCs can leverage their customer relationship to sell local.'" Pet. App. 28a & n.42 (first alteration in original). U S WEST likewise sought to "'provid[e] the convenience of one-stop shopping'" through a

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[2] *See* John J. Keller & Stephanie N. Mahta, *U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules*, Wall St. J., May 7, 1998 at A2.

combination that "will initially allow [U S WEST] to become an interLATA carrier for customers." *Id.* at 32a, 58a (second alteration in original).

For its part, Qwest projected that each alliance would bring it up to $200 million or more in revenue in 1999 alone.[3] It therefore willingly ceded to each BOC effective control of the terms and conditions of the long-distance component of the package. Each BOC established detailed parameters on service quality and performance to which Qwest was required to agree. Pet. App. 65a-66a. The BOCs also established, and exercised prospective control over, the long-distance price. *Id.* at 28a n.45, 33a, 63a-66a. And the BOCs also assumed an unprecedented role in providing "customer care" -- follow-up responses to customer concerns -- providing "all customer support (sign-up and servicing) through the BOC's own toll-free number." *Id.* at 2a.

Further, U S WEST's assertion here that it did not share in the long-distance revenues (Pet. 10) is highly misleading. In the original contract between U S WEST and Qwest, Qwest agreed to pay U S WEST both a flat fee for each customer signed up for the service and additional biannual payments based explicitly upon each customer's long distance revenues. After this litigation commenced, U S WEST required a modification to the contract that eliminated the payments based on the level of long-distance revenues, but that correspondingly increased the flat customer charge with the objective of assuring

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[3] *See* Dow Jones News Serv., *AT&T, MCI Others Sue Ameritech Over Qwest Marketing Pact* (May 14, 1998).

that the new contract would have the same "net present value" to U S WEST as did the previous, explicitly revenue-based one.[4]

4. The FCC held that these BOCs had violated Section 271(a). After reviewing a voluminous record, it found "that Ameritech and US WEST (a) designed and developed a package of services that would include a long distance component; (b) selected the carrier to transmit the long distance service; (c) established, and exercised prospective control over, the price, terms, and conditions under which the long distance component would be offered; (d) served as the initial and primary point of contact for the customer for all service inquiries for the combined offering; (f) [sic] relied on their brand names in marketing the combined offering; and (g) expressly recommended Qwest's long distance service." Pet App. 13a-14a. And it had little difficulty in concluding that the BOCs were therefore "providing" long distance service regardless of whether Qwest was responsible for transmission. It reached that conclusion because each of these BOCs was "effectively holding itself out as a provider of long distance service," "performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public," and obtaining those benefits that are "uniquely associated with the ability to include a long distance component in a combined service offering." *Id.* at 54a, 55a-71a.

The FCC further found that its conclusion that these activities constituted the unlawful "provision" of long-distance service was compelled by the statutory scheme and purpose.

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[4] *See* Deposition of Stephen Michael Jacobsen at 73-74, *AT&T Corp.* v. *U S WEST Communications, Inc.*, C98-634WD (W.D. Wash. June 5, 1998).

"By conditioning BOC entry into the in-region, interLATA market on whether the local market is open to competition, Congress sought to ensure that, when the BOCs obtain authorization to provide long distance services, and thereby offer one-stop shopping, new entrants would also have the opportunity to provide a combined package of telecommunications services to consumers." Pet App. 56a. It found that adopting the BOCs' claims would impede competition by enabling the BOCs to "use[] their control of the local bottleneck to gain an unfair advantage," and would destroy the "carefully balanced incentive structure" that Congress created. *Id.* at 24a, 56a.

On petitions for review filed by U S WEST, Ameritech, and Qwest, the court of appeals affirmed. Contrary to U S WEST's suggestion that the court of appeals did so reluctantly (Pet. 3), the court held that the FCC's approach was "clearly reasonable." Pet. App. 6a. Subsequent to that decision, as part of a settlement, Ameritech and Qwest consented to entry of an order holding that Ameritech had "provided interLATA services in violation of Section 271." *AT&T Corp.* v. *Ameritech Corp.*, No. 98 C 2993 (N.D. Ill. Oct. 22, 1999) (Order). Only U S WEST has continued to challenge the decision.

REASONS FOR DENYING THE PETITION

The tendentious "Question Presented" by U S WEST -- whether it is proper for a court to "rel[y] on *Chevron* . . . to defer to an agency decision on the basis of a fictitious statutory ambiguity manufactured by the agency to accommodate its own policy preferences" (Pet. i) -- obviously presents no issue about which any parties or circuits disagree. It is common ground that "fictitious" and "manufactured" ambiguities are

impermissible. This petition thus presents only the factbound and uncertworthy question of whether this particular case was an instance of such "reliance."

Undoubtedly recognizing this, U S WEST attempts to sell this case instead as an opportunity for a broader examination of the *Chevron* doctrine. However, it does not ask for *Chevron* to be overruled. Instead, it contends that *Chevron* was "manipulated" by the court of appeals. Pet. 2. U S WEST therefore is complaining only about the application of settled law to the facts of this case. And U S WEST's attempt to dress up the decision below as involving a "wholesale transfer[] of lawmaking power" and a "violation of the nondelegation doctrine" (*id.* at 2) adds nothing to that analysis. Such grandiose assertions can always theoretically be made, at least in the derivative way U S WEST makes them here, whenever a party wishes to claim that an agency has misapplied a statute -- for they ultimately amount to nothing more than the uncontroversial observation that the Constitution requires agencies to adhere to congressional enactments.[5]

U S WEST is thus left with its claim that this case merits review because it is allegedly symptomatic of a broader trend in which courts of appeals are giving agencies more deference than *Chevron* does or should permit. There are two dispositive and fundamental problems with this claim.

First, the trend U S WEST decries does not exist. This Court's decisions point in the opposite direction. In the last five years (*i.e.*, back through the beginning of the 1994 Term), the

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[5] The nondelegation claim is a particularly inappropriate add-on in this case. There is no discussion of, or holding on, the nondelegation doctrine in the decision below. That is because U S WEST raised it for the first and only time in its petition for rehearing after the court of appeals' decision issued.

Court has reversed courts of appeals in 12 cases involving the application of *Chevron*. In 10 of those cases, the Court reversed because the court of appeals failed to accord the agency *sufficient* deference.[6] Only 3 of the reversals (including one case that is included in both categories because it involved multiple issues) involved excessive deference.[7] Thus, it is hardly surprising that U S WEST makes no effort to prove its extravagant claims.

Second, even if there were such a trend, this case could not remotely be part of it. U S WEST's argument is that the term "provide" in Section 271(a) has a clear meaning that cannot encompass the activities in which it engaged, and that only "manufactured" ambiguities and servile judicial deference could have produced a result finding its conduct unlawful. That is nonsense. The record established that U S WEST had dictated every significant term of the long distance offering, bundled that offering with its own local services under its own brand name, replaced Qwest as the principal customer interface both at the initial sale and for follow-up communications, indirectly shared interexchange revenues with Qwest, and obtained present and future competitive advantages over long-

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[6] *See INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1448 (1999); *United States* v. *Haggar Apparel Co.*, 119 S. Ct. 1392, 1398 (1999); *National Fed'n of Fed. Employees* v. *Department of the Interior*, 119 S. Ct. 1003, 1011 (1999); *AT&T Corp.* v. *Iowa Util. Bd.*, 119 S. Ct. 721, 733, 738 (1999); *United States* v. *O'Hagan*, 521 U.S. 642, 666-67 (1997); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495-97 (1996); *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 98 (1995); *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Or.*, 515 U.S. 687, 708 (1995); *Reno* v. *Koray*, 515 U.S. 50, 60-61 (1995); *NationsBank, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 264 (1995).

[7] *See Iowa Util. Bd.*, 119 S. Ct. at 734-36; *United States* v. *LaBonte*, 520 U.S. 751, 755-57 (1997); *Dunn* v. *CFTC*, 519 U.S. 465, 470 (1997).

distance carriers and competing local exchange carriers by ubiquitously offering "one-stop shopping" before any other carrier could economically do so. Indeed, the FCC found that "[t]he only long distance function the [BOC] defendants do not perform under their respective arrangements is the actual transmission of calls across LATA boundaries." Pet. App. 67a.

U S WEST's argument -- and the only theory under which its conduct could be found permissible -- is therefore that the term "provide" in Section 271(a) must be read solely to mean "transmit" (or "resell transmission"). Pet. 19.[8] But the FCC and the court of appeals properly employed all the traditional tools of statutory construction -- text, legislative history, statutory structure and purpose -- in rejecting this implausible claim.

To begin with, U S WEST's claim is contradicted by the statutory language. Congress did not prohibit merely "transmission." It prohibited carriers from "providing" interLATA service. The dictionary defines "provide" as, among other things, to "make available" or "arrange for."[9] Here, U S WEST plainly arranged for long-distance service for its customers and made that service available without transmitting the long-distance calls itself. This understanding of

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[8] U S WEST elsewhere seeks to obscure the issue by focusing on the definition of "interLATA service." Pet. 7. But as the court of appeals explained, there is no dispute about the definition of "interLATA service" -- the issue is what it means to "provide" such a service. Pet. App. 5a.

[9] *See Random House Unabridged Dictionary* 1556 (2d ed. 1993).

"provide" is so commonplace that U S WEST's own marketing scripts described U S WEST as a "long-distance . . . provider." Pet. App. 34a n.70.[10]

The legislative and judicial history of this provision likewise weighs strongly against U S WEST's crabbed construction. As the FCC observed (Pet. App. 52a-53a), the Conference Report for the 1996 Act uses "provide" as synonymous not with "transmit" but with "offer." And, as noted *supra* p. 4-5, the predecessor provision of the MFJ used the same word, "provide," in the same context, as synonymous not with "transmit" but with "marketing or selling." "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998). Moreover, because the court in the MFJ cases was construing the term "provide" *de novo*, U S WEST's contention that the D.C. Circuit erred in approving the FCC's interpretation of the same term in the same way as *reasonable* is particularly farfetched.

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[10] U S WEST also contends (Pet. 20) that the FCC should have applied the same construction of the word "provide" that it employed in construing a different provision of the Act, 47 U.S.C. § 275, that deals with alarm monitoring. It is difficult to see how that would help U S WEST, for its conduct would be unlawful under either construction. In the alarm monitoring decision, the FCC did not define "provide" to mean "transmit." Instead, as U S WEST admitted below, the FCC held that "when an arrangement so 'intertwines' a BOC with an unaffiliated [alarm monitoring] provider as to result in a *de facto* affiliation between the two companies," the arrangement will violate § 275. Brief of Petitioners U S WEST et al. at 27, *U S WEST et al.* v. *FCC*, No. 98-1468 et al. (D.C. Cir., filed March 23, 1999) (quoting *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services*, 12 FCC Rcd. 3824 at ¶¶ 38-40). In any event, the court of appeals correctly found that the FCC acted properly in construing the term "provide" in Section 271 somewhat differently from the term "provide" in Section 275. Pet. App. 8a.

Finally, drawing the line at "transmission" would serve no conceivable statutory purpose. U S WEST does not even suggest such a purpose. Instead, it mischaracterizes the court of appeals' and the FCC's examination of the "overall purposes of the Act" (Pet. App. 3a) as the court and the FCC merely implementing their own views of "good policy." Pet. 23. But as Justice Scalia has explained (in the article cited by U S WEST, Pet. 13-14), "one of the most frequent justifications" for a court to "choos[e] a particular construction is that the alternative interpretation would produce . . . results less compatible with the reason or purpose of the statute. . . . Policy evaluation is, in other words, part of the traditional judicial tool-kit. . . ." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515 (1989).

Here, the court and the FCC correctly found that U S WEST's proposed definition of "provide" would thwart the policies Congress intended to advance. As the court of appeals explained, U S WEST's interpretation would "tempt the BOCs to defer conduct that Congress hoped to accelerate -- acts facilitating the development of competition in the [local] market", and would permit them to "position[] themselves in the [long distance] markets before § 271 allows them actually to enter." Pet. App. 6a, 7a. Further, the FCC properly found that permitting BOC entry into the long-distance market while local markets remained closed would mean "less long distance competition" because the BOCs would be able to "gain an unfair advantage against long distance carriers" in precisely the way Section 271 was designed to foreclose: in particular, by becoming the only carrier able to provide one-stop shopping throughout its region. Pet. App. 24a Indeed, the BOCs' own documents showed that they entered into these alliances for just

that reason. Pet. App. 28a & nn. 42, 43, 32a & n.60, 57a & nn. 129, 130. It thus required only the most traditional, garden variety exercise of statutory construction to find U S WEST's conduct unlawful.

CONCLUSION

The petition for a writ of certiorari should be denied.

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court that the Rule 29.6 statement filed with its petition for a writ of certiorari is still complete and accurate.

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ADMINISTRATIVE MATERIALS

Letter of Nov. 15, 1999, from Richard E. Fairfax, OSHA, to Mr. T. Trahan <http://www.osha-slc.gov/html/hot_4.html> 5

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The briefs in opposition depict this case as presenting only a garden variety question of statutory interpretation. Indeed, respondents suggest that a *marketing* arrangement between U S WEST Communications, Inc. ("U S WEST") and Qwest Communications Corporation ("Qwest") should be deemed to constitute the *provision* of long distance service under any "natural" construction of the term "provide" in section 271(a) of the Telecommunications Act of 1996 ("1996 Act").[1] Respondents are wrong about both the manner in which the Federal Communications Commission ("FCC") approached the statutory provision at issue in this case and the broader significance of this petition.

In the *Order* below, the FCC determined that U S WEST's marketing arrangement constituted the "provision" of long distance service, not because of any "natural" understanding of the words Congress used, but rather because the agency preferred to maximize U S WEST's "incentives" to seek agency approval under section 271. The D.C. Circuit, far from purporting to rely on the canonical meaning of the word "provide," took the FCC's manufactured ambiguity at face value and expressly invoked *Chevron*[2] deference in affirming the *Order*. *See* Pet. App. 2a-4a.

The agency made no bones about the genesis of its novel "involvement" standard. *See id.* at 47a-48a, 53a-54a. The roots

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[1] Brief for the Federal Respondents in Opposition ("Gov't Opp.") 11; *see also* Brief of AT&T Corp. and MCI WorldCom, Inc. in Opposition ("Int. Opp.") 12.

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

of that standard lie not in any "interpretation" of the words Congress used — indeed, the agency's reading of the statute has nothing to do with those words as commonly understood or as defined by the terms and structure of the 1996 Act — but in the FCC's replacement of what Congress had written with what the agency believed Congress should have written. That assumption of legislative power is in plain derogation of both the nondelegation doctrine and sound principles of statutory construction.

ARGUMENT

1. Respondents, in an effort to deflect attention from the central issue in this case, attack an obvious straw man when they assert that U S WEST contended below that "provide" is synonymous with "transmit."[3] To the contrary, U S WEST noted that all definitions of the common verb "provide" share a core meaning: They refer to putting forth a product or service oneself, as contrasted to performing ancillary services for another who is doing so.[4] "Providing" can be done directly (by carrying long distance traffic over one's own facilities), indirectly (by reselling another's long distance transmission services), or — as the FCC itself had held until this case[5] — by entering into a revenue-sharing arrangement that would "intertwine" a BOC with a nominally unaffiliated long distance

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[3] *See* Gov't Opp. 10; Int. Opp. 12.

[4] *See* Pet. 19 (noting that the marketing agent of a telephone company does not "provide" service within the commonly understood meaning of that term).

[5] *See id.* at 20 (discussing FCC's interpretation of "providing service" in *Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 FCC Rcd 3824, at ¶¶ 38-40 (1997)).

provider.[6] It is undisputed that U S WEST engaged in none of these activities: U S WEST received a flat fee per customer to market Qwest's services, while Qwest alone processed each customer's order, entered into the contractual relationship with the customer to provide long distance services, transmitted all of the customer's long distance calls, and received all revenues from the customer (and bore the risk of nonreceipt). *See* Pet. 9-10. Qwest provided its services under its own brand name, was identified as the long distance provider on all bills, and had full responsibility for maintaining and restoring long distance services. *See id.* at 10. The *Order* found U S WEST to be the "provider" of the services not because its activities fit any definition of that term but because that result would maximize U S WEST's incentives to seek relief under section 271.[7]

2. Like any other statutory interpretation case, this one involves a particular section of a particular statute (albeit a very important one). But the significance of this case is not limited to the 1996 Act. The decision below countenances a practice by which administrative agencies can manipulate the *Chevron* framework to *ignore* what Congress has enacted into law by characterizing as "ambiguous" any statutory provisions that do not suit their visions of good policy. The *Order* seized on the existence of multiple (but quite similar) dictionary definitions of the verb "provide" as a basis for declaring section 271(a)'s ban on "provid[ing]" certain long distance services to be "ambiguous." *See* Pet. App. 44a-46a. That declaration freed the agency from the constraint of interpreting section 271(a) by reference to what Congress meant in using that verb. Instead, the agency used the possibility that Congress *might* have meant

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[6] *See id.* at 19-20; *cf.* Int. Opp. 13 n.10 (mischaracterizing U S WEST's argument).

[7] Pet. App. 21a, 53a-55a.

"furnish" or "make available"[8] as an excuse to adopt a wholly new meaning — "involve" — that transformed the statute into what the FCC would have enacted had it, rather than Congress, drafted the law.[9] Although the FCC's formless "involvement" standard is unconnected to the words Congress used — indeed, the agency itself justified its statutory construction by reference to a free-floating notion of what Congress might have said but did not, *see id.* at 44a-45a, 53a-54a — the D.C. Circuit felt itself bound to affirm on the basis of *Chevron*.[10]

This case therefore exhibits a process of statutory construction turned upside down: No longer a search for the meaning of what Congress wrote, it is instead a quest to identify statutory ambiguity sufficient to justify *Chevron* deference.[11] If

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[8] *See id.* at 44a & n.107 (quoting The American Heritage College Dictionary).

[9] The government attempts to downplay the extent to which the *Order* equates "provide" with "involve." *See* Gov't Opp. 10-11. In fact, the FCC's test for judging whether a Bell Operating Company ("BOC") has violated section 271(a)'s ban on "providing" long distance service turns on the agency's evaluation of "the totality of [the BOC's] *involvement*" in the long distance market. *See* Pet. App. 54a (emphasis added).

[10] Respondents' efforts to pretend that the result below did not turn on the deference accorded the FCC ignore the FCC's brief below — which claimed deference, *see U S WEST Communications, Inc. v. FCC*, No. 98-1468, Brief for Respondents 36 (D.C. Cir. Feb. 18, 1999) — and the opinion below, which gave it. *See* Pet. App. 2a-4a.

[11] The government suggests that dicta in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 397 (1999), somehow mean that the FCC's efforts to resolve statutory ambiguities cannot implicate the nondelegation doctrine. The question there was not whether the authority delegated by Congress was sufficiently defined to satisfy the nondelegation doctrine — sections 251 and 252 plainly met that standard — but rather how to accommodate the tension between potentially inconsistent delegations to the states and the FCC. *Iowa Utilities* plainly did not suggest, much less hold, that the section of the 1996 Act

such a result-driven process is indeed shielded by *Chevron* — and the D.C. Circuit, like other courts, had no difficulty concluding that it was[12] — then any agency can rewrite any statutory provision that contains any degree of imprecision (which is to say almost any law) to mean almost anything. In effect, an agency can arrogate to itself the power to say what the law is notwithstanding what Congress has actually dictated. That assumption of fundamental lawmaking authority by an administrative agency goes far beyond the interstitial gap-filling contemplated in *Chevron* itself, and so shifts the locus of legislative power as to run afoul of the nondelegation doctrine.[13] This growing tendency is by no means confined to this particular administrative agency — the most recent example having been

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at issue here gives the FCC carte blanche to create "incentives" as the agency best sees fit.

[12] *See* Pet. App. 3a-6a; Pet. 13-17 & nn.17, 18, 20.

[13] This petition therefore raises even more troublesome delegation issues than those now presented for review by the government in *Browner v. American Trucking Ass'ns, Inc.*, No. 99-1257 (petition for cert. filed Jan. 27, 2000). In the *American Trucking* petition, the government asserts that the D.C. Circuit wrongly concluded that EPA's interpretation of the Clean Air Act was so broad as to be of questionable constitutionality under the nondelegation doctrine. In that case, the government states that the nondelegation doctrine "raises issues of extraordinary governmental concern." *See id.* at 9. In this case, the FCC's transformation of quite *specific* language in the 1996 Act into an expansive grant of discretion raises even larger questions under the nondelegation doctrine. *See* Pet. 26-27 & n.37. If the Court does not grant this petition outright, Petitioner respectfully submits that disposition of this petition should be held pending action on the government's petition in *American Trucking*.

the (just-retracted) view of OSHA that its statutory authority extended to "workplace" conditions in the home.[14]

Although the government contends that the *Order* is founded on some "intelligible principle" sufficient to satisfy the nondelegation doctrine,[15] it never identifies that principle (instead asserting vaguely that the FCC's reading of section 271(a) promotes the 1996 Act's general goals). That is because the *Order* in fact defines a roving mandate to investigate whatever BOC behavior the FCC thinks to be inconsistent with the spirit of the 1996 Act (as perceived by the agency) — even if such conduct otherwise would fall outside the FCC's statutory jurisdiction. *See* Pet. 28-29 (explaining that FCC's construction of section 271(a) reaches conduct such as billing and collection services that the agency does not or cannot regulate in any other context). Such a mandate necessarily runs afoul of the nondelegation doctrine because it is based on no "intelligible principle" *articulated by Congress*. Indeed, like the EPA

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[14] *See* Letter of Nov. 15, 1999, from Richard E. Fairfax, OSHA, to Mr. T. Trahan (indicating that OSH Act applies to a "workplace" in the home); Amy Joyce, *Reversal Sought on OSHA Telecommuting Rule*, Wash. Post, Jan. 5, 2000, at E1. Such examples notwithstanding, the intervenors, but notably not the government, suggest that the problem is really the opposite — that the courts of appeals give too little deference to agencies. *See* Int. Opp. 10-11. But the intervenors cannot blink the growing number of cases in which agencies manipulate *Chevron* to exploit the freedom that comes from declaring a statute ambiguous. *See* Pet. 14-16 & nn.18, 20. For example, in *Beverly Enterprises, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (*en banc*), the Fourth Circuit concluded that a "policy bias" had led the NLRB to adopt a misguided application of the statutory phrase "independent judgment." Significantly, in *Beverly Enterprises, Inc. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999), the D.C. Circuit upheld the same interpretation as applied to the same plaintiff.

[15] *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

decision struck down in *American Trucking Ass'ns v. EPA*,[16] the FCC's interpretation of section 271(a) is scarcely cabined by any limiting principle at all,[17] leading the court below to observe that the FCC's interpretation could be "nonsensical" if turned into "an excuse to stifle the BOCs at every opportunity," *see* Pet. App. 7a.[18]

3. The possibility that an agency may exploit a supposed ambiguity in a statute to adopt a hitherto unexpected legal interpretation also creates substantial uncertainty about the scope of the law and leaves private parties without reliable signposts to guide their behavior. In this case, for example, it not clear how any BOC could have predicted the statutory construction adopted below: The FCC's interpretation of section 271(a) to bar "involvement" does not comport with any dictionary meaning of "provide," with any common understanding of that term, or with the approach taken in prior

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[16] 175 F.3d 1027, *modified in part*, 195 F.3d 4 (D.C. Cir. 1999), *petition for cert. filed sub nom. Browner v. American Truckers Ass'ns*, No. 99-1257 (Jan. 27, 2000). The oppositions observe that U S WEST did not cite *American Trucking* until its petition for rehearing below, but they fail to note that *American Trucking* was decided almost two weeks *after* oral argument in this case. In any event, the nondelegation argument could be raised anew in this Court under the "enlargement" doctrine, *see Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in judgment), because it is merely an elaboration of the reasons why U S WEST's arrangement with Qwest cannot be deemed the "provision" of long distance services.

[17] *See* Pet. 26-29.

[18] The government takes issue with U S WEST's earlier citations to this passage, Gov't Op. 13, but the opinion below speaks for itself. *See* Pet. App. 7a (affirming the FCC's interpretation of section 271(a) "as a general approach" but finding that "too-broad a notion of 'competitive advantage' or 'incentive' could make [that interpretation] nonsensical").

FCC decisions. *See* Pet. 18-24.[19] Congress certainly could have enacted a broader prohibition of "involvement" in the long distance business, presumably giving some guidance about the extent of such a broad ban. That it chose instead only to bar the "provision" of long distance service was reasonable ground for a BOC in U S WEST's position not to expect that the FCC would transform that rifleshot prohibition into a blunderbuss Congress chose not to fire.

The government recites a litany of reasons why the *Order* advances important policy goals perceived by the FCC. *See* Gov't Opp. 11. But "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). The government's policy primer suggests why Congress *might* have chosen to ban BOC "involvement" in long distance, but it does not demonstrate that Congress in fact did so.[20] If anything, the government's opposition only underscores how far afield the FCC's statutory interpretation has strayed from what the statute says: The government seems to believe that statutory analysis should begin not with what Congress has written but with what the experts believe would be good law. As this case demonstrates, the result of such ends-oriented reasoning is a

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[19] The government asserts that the FCC's reading of the statute is the "natural" one. *See* Gov't Opp. 11. But a woman or man on the street would not regard Best Buy or Radio Shack, for example, as wireless service "providers," even though they sell cellphones, make it easy for consumers to sign up for wireless service, and provide customer assistance where phones are still under warranty. Nor does the FCC regulate them as such.

[20] To the contrary, the scope of section 271 is considerably narrower than were the preexisting line of business restrictions in the AT&T Consent Decree, *see* Pet. 7-8, 19, 23 — a point that the intervenors ignore, *see* Int. Opp. 13.

degree of uncertainty that undermines the legitimacy of administrative decisionmaking.

4. Finally, the government suggests that certiorari should be denied because U S WEST and Qwest have announced a plan to merge. *See* Gov't Opp. 10 n.6. But a merger would not moot this case, as the government seems to recognize. A claim for damages is pending below based on the joint marketing agreement between U S WEST and Qwest. *See* Pet. 10 & n.16. This Court has often noted that a claim for damages makes judicial review appropriate even where other relief has been mooted.[21] And a merger of U S WEST and Qwest would not alter by one iota the appropriateness of reviewing the approach to *Chevron* embodied in the decision below.

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The government's position in this case illustrates the damage that can stem from a tragedy of small decisions. The government appears to believe that, as Congress could have banned BOC involvement in long distance, it was perfectly lawful for the FCC to do so in Congress' name. But what the government portrays as the seemingly quotidian character of this decision in the name of *Chevron* is the whole point: It shows how far the focus of statutory analysis has shifted away from the statutory landmarks filled in by Congress to the regions Congress left blank. If each new point penciled in by an

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[21] *See, e.g., Ellis v. Brotherhood of Clerks*, 466 U.S. 435, 442 (1984); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) (distinguishing the case cited by the government, *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970) (*per curiam*), in light of damages claim in *Havens*); *see also Calderon v. Moore*, 518 U.S. 149, 150 (1996) (*per curiam*) ("'even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot'") (alteration in original) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992)).

administrative agency appears to rest on *terra firma*, that is only because the entire doctrinal landscape has become so deformed that it is impossible to see that agencies are no longer bridging gaps between legislative landmarks but are instead plotting points on the open sea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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